Joint Northern and Central Land Council

Submission to the Northern Territory Department of Environment and Natural Resources:

Environmental Regulatory Reform Discussion Paper

June2017

Introduction

The Northern and Central Land Councils are independent statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and also Native Title representative bodies for the purposes of the *Native Title Act 1993*. Pursuant to the ALRA more than 50% of the NT and around 85% of the NT coastline is now held by Aboriginal Land Trusts on behalf of traditional owners.

The **Northern Land Council** (NLC) was established in 1973 and became an independent statutory authority following passage of the ALRA in 1976. Within its jurisdiction, the NLC assists traditional owners by providing services in its 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 for facilitating economic development over more than 210,000 square kilometres of the land mass of the Northern Territory.

NLC's vision is for a Territory in which the rights and responsibilities of every Traditional Aboriginal Owner are recognised and in which Aboriginal people benefit economically, socially and culturally from the secure possession of their lands, seas and intellectual property. Our mission is to assist Aboriginal people in the northern region of the NT to acquire and manage their traditional lands and seas, through strong leadership, advocacy, industry engagement and management.

The **Central Land Council** (CLC) has statutory responsibilities under the ALRA for approximately 780,000 km² of land in the southern half of the Northern Territory. Of this area 417,318 km2 is Aboriginal land under the ALRA. The CLC is also a Native Title Representative Body established under the *Native Title Act 1993* ('NTA') for the same region. Given existing pastoral land could not be claimed under the ALRA, Aboriginal freehold land in the CLC area tends to be very arid and remote. Some traditional owners unable to claim land under the ALRA have succeeded in obtaining rights to small areas known as Community Living Areas, under NT legislation.

Through its elected representative Council of 90 community delegates the CLC continues to represent the aspirations and interests of approximately 17,500 traditional landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

The CLC aims to improve the lives and futures of its Aboriginal constituents through sustainable development and change. The CLC's development approach is based on an integrated and strengths-based strategy of building economic, social and cultural capital. Consistent with its statutory functions the CLC undertakes significant initiatives relating to: natural and cultural resource management; the development of remote enterprise and employment pathways; innovative community development work, ensuring land owners use income generated from

land use agreements for broad community benefit; and negotiating land administration and land use agreements for third parties and traditional owners.

Overview

NLC and CLC welcome the reform process being undertaken by the NT Government, and the opportunity to be part of this process.

As noted in the discussion paper, previous reviews and submissions to those reviews have raised a number of issues and argued the need for reform. We concur that reform is essential. There is widespread dissatisfaction with the operation of the current system, including comment on its failings by the NT EPA itself. There is now the opportunity to implement a system that addresses existing shortcomings and effectively supports Aboriginal people in caring for their land and waters.

It is important that a coherent, principled framework of environmental protection legislation be enacted that recognises the status and cultural values of the Northern Territory's first peoples. Any new legislation should require assessments and approvals to be done in accordance with the principles of ESD that incorporate specific reference to Aboriginal cultural knowledge and the protection of Aboriginal cultural values.

To ensure genuine reform goes ahead, we urge the NT Government to adopt the following:

- Commitment to a clear timeline and the resources required to undertake the reform agenda;
- Ongoing consultation with key stakeholders, including for developing draft TEOs (not simply providing comment after they have been drafted) and offsets policy;
- An appropriate engagement process with Traditional Owners through the land councils, particularly on key questions such as community consultation and incorporation of traditional knowledge, to ensure prior and informed consent in the development of legislation and policy frameworks;
- Recognising that this is a significant body of work and some areas may be longer term, identification of key reforms to be implemented within the next two years, including:
    - Development of an offset policy
    - Expansion of the NT EPA to include Aboriginal representation
    - Guidelines for community consultation
    - Measures for increasing public confidence in the information underpinning environmental assessments
    - Guidelines for communicating EIS/complex information to enhance understanding and participation in the decision making processes

Legislation relevant to Aboriginal land interests

NT is unique in having the ALRA, as well as the *Northern Territory Aboriginal Sacred Sites Act 1989*. The Native Title Act and *Aboriginal Land NT Act 1978* also provide protection for Aboriginal rights and interests over land and sea. It is essential to be clear on how any legislative changes will interact with these Acts, and to ensure Aboriginal rights are acknowledged and not compromised.

The ALRA was the first attempt by an Australian government to legally recognise the Aboriginal system of land ownership and put into law the concept of inalienable freehold title. It is a fundamental piece of social reform that has provided land for many Aboriginal people in the Northern Territory and so enabled them to maintain, and in some cases to re-establish, their cultural identity.

By providing legal title and a measure of control over Aboriginal land, the Act has allowed Aboriginal landowners to determine the pace and extent of involvement in the broader Australian society and economy. ALRA has contributed to the responsible development of the Northern Territory by providing traditional landowners with rights to make decisions about their own country, and providing third parties with certainty about the process for accessing Aboriginal land. The many resource development projects and commercial enterprises now operating on Aboriginal land show that respecting our land rights can be compatible with national economic development.

The Land Rights Act sets out the functions and responsibilities of the land councils.
Section 23 sets out core functions, to:

- identify the relevant traditional owners and affected people;
- ascertain and express the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters;
- consult with traditional Aboriginal owners and other Aboriginal people affected by proposals;
- negotiate on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim;
- assist Aboriginal people carry out commercial activities; obtain traditional owners informed consent, as a group;
- assist in the protection of sacred sites;
- direct a Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

In addition, the ALRA underpins the sacred site protection regime in the NT by allowing the Territory to make laws to protect, or prevent the desecration of, sacred sites in the NT; providing the Land Councils with functions to ensure the protection of sacred sites; and making it an offence to enter or remain on land that is a sacred site. The NT is the only jurisdiction in Australia that provides sacred sites with such protection and should rightly be proud of this achievement and the recognition it affords to Aboriginal people in the NT. Such protections mean that Aboriginal people can safely

support development proposals on their land in the comfort that their sacred sites will be adequately protected in the face of such developments. It is the long-standing experience of the land councils that Aboriginal people are supportive of sustainable development and willing for their land to provide opportunities for employment and income for their benefit. However, this is only true insofar as they can be confident that sacred sites are not at risk. Sacred sites are places of deep spiritual significance and are an integral part of Aboriginal culture. Their protection is vital for the continuation of religious and cultural traditions and as a source of identity for Aboriginal people. Consistent with our functions, the land councils assist Aboriginal people to protect their sacred sites by ensuring that every development proposal that comes before the councils (including exploration and mining, infrastructure and road works) is subject to site clearance (work area clearance process) either through the land council itself or through the Aboriginal Areas Protection Authority (AAPA).

Expert Report on Proposal for Environmental Regulatory Reform in the Northern Territory

The CLC and NLC commissioned the attached report in response to the *Environmental Regulatory Reform Discussion Paper May 2017* and support all of the recommendations made in the report.

It is essential to view these recommendations in light of the unique NT context: that Aboriginal people make up approximately 30% of the population[1] (ABS 2011), the extensive Aboriginal property rights and interests, and the Acts discussed above.

These demographics and the significant land and waters asset base position Aboriginal people as owners, managers and major investors in policy and programs relevant to our cultural, economic, social and environmental interests. However, this is not recognised in current legislative, institutional and policy frameworks. Aboriginal representation on bodies such as the EPA Board and any advisory boards should reflect this significant role.

With reference to Aboriginal interests, we draw your particular attention to the following areas:

Territory Environmental Objectives (TEOs)

As raised with DENR staff, the land councils emphasise our desire to be involved in the development of draft TEOs, to ensure consideration is given to Aboriginal interests at the earliest stage.

[1] ABS (2011), *Estimates of Aboriginal and Torres Strait Islander Australians*, Australian Bureau of Statistics, http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001 [accessed 22/6/17].

TEOs provide a mechanism for inserting Indigenous interests early in the EIA process. Recognition of Aboriginal cultural values is essential, and TEOs must be in alignment with the Sacred Sites Act and ALRA. Without knowing the proposed format of TEOs, it is difficult to provide input. However, we have attached some examples of how TEOs that are inclusive of Aboriginal interests may look as Appendix A.

Incorporating traditional knowledge

The significance of fully integrating traditional knowledge into the Northern Territory's environmental impact assessment process should not be underestimated. Aboriginal traditional knowledge has developed over millennia and is key to management of a variety of specific environments, yet it remains largely ignored by industry and by environmental scientists and managers. This is the outcome of ineffective policies that have been implemented without consideration of the value of traditional knowledge, and how it can be respectfully acquired and utilised to improve conservation of the Northern Territory environments.

Currently, recognition of traditional knowledge in the environmental impact assessment process in the Northern Territory remains a matter of policy, not law. Recent application of the policy by the NTEPA has led to gathering of traditional knowledge specific to areas and to projects, but there are few examples where the knowledge is being used to its full effect. As a consequence of loose application of policy due mainly to lack of a formal framework that defines how traditional knowledge should be used, in most cases it is simply being catalogued, categorised and stored in databases, but not being used in a meaningful, rational or scientific way in the Northern Territory.

Incorporation of traditional knowledge into legislation and through every stage of the EIA process would address this.

Meaningful community engagement

Culturally appropriate consultation is essential and lacking in the present system, where there is no requirement for on-country consultation in the EIA process. Currently, crucial data is often not released until late in the process, and there is not sufficient time for it to be adequately reviewed, let alone communicated to Indigenous stakeholders who are directly affected. EIA documentation should at minimum include a plan outlining culturally appropriate consultation to be undertaken on-country prior to conclusion of the assessment process, and ongoing throughout the term of the project.

As outlined above, traditional knowledge can make a valuable contribution to environmental outcomes and the EIA process. In keeping with modern best practice principles, it is essential that the EIA process consider social and cultural impacts alongside environmental. History has shown that in the Northern Territory, during 'consultation' with Aboriginal people, project developments

are presented as *fait accompli*, with little opportunity to input any changes that might be necessary to protect sensitive areas having cultural values.

A survey of Recent Terms of Reference/EIS guidelines issued by the NTEPA does not demonstrate a consistent or in-depth approach to engaging Aboriginal people on questions regarding the risk a project might pose to traditional knowledge and/or Aboriginal culture. The main focus continues to be on protecting past aspects of culture (i.e. heritage) and not the more relevant living aspects that define the values of current Aboriginal society. The focus should be shifted to structured gathering, management and use of traditional knowledge via participatory engagement.

A fully participatory engagement process that carries Aboriginal people through project development from initial planning to project closure, encompassing environmental impact assessments, risk analysis and management at all phases of the project would represent the gold standard for consultation. Participation at this level offers the opportunity for Aboriginal people to manage their cultural estate and apply traditional knowledge across the whole of the project's life in a practical and meaningful way (Smith 2016)[2].

The CLC and NLC recommend that environmental assessment and approval legislation should include an obligation on the proponent to consider how they engage with Aboriginal communities and Traditional Owners and that they:

- work with the community during planning and conducting its research
- seek the prior and informed consent of the community prior to acquisition of information
- collect traditional Aboriginal knowledge in collaboration with the community
- respect traditional Aboriginal knowledge and Aboriginal intellectual property rights, and
- bring traditional Aboriginal knowledge and scientific knowledge together.

Further, we recommend that proponents should be required – under legislation - to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter. A key element of the consultation report and engagement plan needs to involve engaging with Aboriginal communities and should be conducted in accordance with guidelines on matters such as:

- 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

[2] Smith, HD (2016): Life of Mine Planning and Cultural Sustainability on Aboriginal Land, *First International Congress on Planning for Closure of Mining Operations*, Santiago, Chile.

- resources provided to facilitate engagement

Failure to complete consultation reports and engagement plans adequately (for example, in accordance with the guidelines) should be part of the adequacy review conducted by NT EPA.

Environmental offsets

Aboriginal landowners have an interest in offset policy from two perspectives: as communities directly and indirectly affected by the environmental, social and/or cultural impacts of projects, and as businesses taking part in the offset economy.

A well-designed offset framework will support economic development in Aboriginal communities, provide employment, preserve traditional knowledge and generate social benefits, while ensuring a net environmental benefit.

Where possible, offsets should be applied within the bioregion of the project. Where there are direct impacts on a community (for example deterioration of water quality), local application should be a requirement and should utilise Aboriginal businesses and/or Aboriginal employment if available.

We request that the Land Councils have an opportunity to provide input from the earliest stages of development of an offset policy; further, that this policy does not wait on the delivery of the full reform agenda, but be progressed immediately.

Specifically, we recommend that:

- The Department of Environment and Natural Resources should immediately begin community consultation on environmental offsets before a Discussion Paper is prepared.
- These consultations should form the basis of a Discussion Paper on offsets, including principles and mechanisms to give clear guidance on the scope and application of the scheme and to address ecological, social and equity considerations.
- Consultation should be ongoing, including the establishment of an independent Steering Committee with oversight and advisory functions.

APPENDIX A: Example TEOs incorporating an Indigenous perspective

(1) The Territory recognises that the well-being of its peoples are built on strong and enduring relationships with lands and seas and is committed to maintaining and where necessary re-building those relationships.

(2) The Territory will maintain and enhance the quality of environments and their contributions to human well-being by:

- maintaining critical features of the structure and function of Territory landscapes at all spatial scales
- protecting biophysical and cultural connections within and among important elements of the landscape.

(3) The Territory seeks strong sustainability from all developments so that livelihoods and other contributors to well-being are improved without substantially reducing natural and cultural capital.

(4) The Territory will manage land and seascapes to maintain the high quality of ecosystems services that underpin customary and commerce-based livelihoods and lifestyles.

(5) To foster equity in sharing of benefits and costs of development, proposals will show and be assessed on how benefits are generated and delivered and costs minimised for the local and regional people most directly affected by development-related change.

(6) To ensure that gains in environment, economy, and social and human capital are mutually reinforcing, major resource use or development will be designed to help resolve existing environmental problems while avoiding new ones.

(7) To foster an informed and hence engaged and supportive public, the Territory will require full and timely public access to information and analysis used in decision-making on resource use and management, and environmental impacts and their management.

(8) To ensure that no segment of Territory society is systematically disadvantaged relative to others, Territory law will require that all natural and cultural values identified through regular consultations with the community are considered by decision-makers in resource use and management.

(9) To ensure consideration of the full range of values affected by resource management decisions, the Territory will require developers and regulators to explain important decisions in terms of the weight given to different values.

(10) Because Indigenous Territorians suffer severe disadvantage but have particular rights and obligations in regard to lands, seas and natural resources, specific Indigenous values, allocations, entitlements and access to benefits must be addressed in all development and natural resource management plans.

(11) To help overcome systemic disadvantage, partnerships with Indigenous people will assist them to participate fully in development and resource use decisions affecting them.

(12) Government will provide direction and context for other sectors by supporting and coordinating regional resource management, conservation and development plans framed by landholders and their communities and designed for strong sustainability.

(13) To inhibit over-concentration of development and resource use in one or a few locations or entitlement in the hands of a few individuals or groups, processes for allocation of entitlements, particularly early in the development/use cycle will be designed to foster equitable access.

WESTWOOD SPICE

BETTER OUTCOMES ▸ BETTER LIVES

Report

Central & Northern Land Councils

Expert Report on Proposal for Environmental Regulatory Reform in the Northern Territory

30 June 2017

Jeff Smith
WestWood Spice

Level 2, 10 Mallett Street
Camperdown NSW 2050
Ph: 02 8594 0594
Fax: 02 8594 0595
Email: jeffsmith@westwoodspice.com.au
Website: www.westwoodspice.com.au

Table of Contents

List of tables

List of figures

Abbreviations and Acronyms

AHIP	Aboriginal Heritage Impact Permit
EPBC Act	Environment Protection and Biodiversity Conservation Act
EIA	Environmental Impact Assessment
ESD	Ecologically Sustainable Development
IAP2	International Association for Public Participation Australasia
IPA	Indigenous Protected Area
NTCAT	Northern Territory Civil and Administrative Tribunal
NT EPA	Northern Territory Environment Protection Authority
PBC	Prescribed Bodies Corporate
SEA	Strategic Environmental Assessment
TEO	Territory Environmental Objectives
UNSDG	United Nations Sustainable Development Goals

Executive Summary

This expert report was commissioned by the Central Land Council and the Northern Land Council. The Land Councils engaged WestWood Spice to review the NT Government proposal for reform – namely, the *Environmental Regulatory Reform Discussion Paper* of May 2017 - and provide expert advice to them regarding a best practice environmental regulation regime.

The report was written by Jeff Smith, Senior Consultant with WestWood Spice and an environmental lawyer with over 20-years' experience in the field of environmental law and policy. Jeff has a sophisticated understanding of environmental policy and legal frameworks across Australia. He is currently consulting to government and non-government organisations on governance, sustainability, climate change, environmental litigation and dispute resolution, biodiversity conservation and planning. Jeff has also spent five years working in government and has engaged with government throughout his career, serving on numerous senior-level steering committees, forums and policy processes.

This report agrees with the clamour and appetite for reform of environmental regulation in the Northern Territory. The current regulatory framework is outdated, and the various reports in recent years are replete with examples of inconsistency, lack of transparency and even disregard for the rule of law. Laws cannot operate effectively without community trust and confidence and it is clear that there is little faith left in the current system.

It is arguable that the current reform process offers a once-in-a-generation opportunity for genuine and long-lasting reform. In this light, it is crucial that the momentum is maintained while, at the same time, the importance of ongoing, meaningful community participation is recognised, supported and resourced, both as a means of ensuring the laws are sound and workable and that the community is on board with their direction.

Likewise, it is imperative that consultation is iterative and ongoing. An iterative process – which builds on the previous stage, delineates controversial and non-controversial issues and amplifies understandings and consensus – offers the best way forward, ensuring that momentum is not lost but that key issues have not been brushed aside.

The report makes 83 recommendations to ensure that the NT adopts a best practice environmental regulation regime.

Recommendations

The road to reform

Recommendation 1: Create a single environment approval process with the Environment Minister as decision maker (as per Option 2 of Hawke Review II).

Recommendation 2: (in the alternative): Build Option 2 into the current environmental regulatory reform agenda as Stage 3, allowing time to transition and, in particular, for the resource implications of this model to be identified, assessed and worked through.

Recommendation 3: The NT government should not enter into bilateral agreements with the federal government to assume responsibility for the approval of actions which trigger the federal environmental assessment regime.

Purpose and principles of assessment systems

Not applicable.

Defined assessment triggers

Recommendation 4: The failure to refer a relevant activity and to obtain approval is an offence.

Recommendation 5: The person or organisation carrying out the activity may be either prosecuted or fined, depending on culpability.

Recommendation 6: Significant penalties should be in place to deter proponents from failing to refer.

Recommendation 7: An activity should be defined broadly to include a development, project, plan, program, policy, operation, undertaking, change in land use, or an amendment of any of these things.

Recommendation 8: Likely should include a real or not remote chance or possibility.

Recommendation 9: Significant should be defined as important, notable or of consequence, having regard to its context and intensity.

Recommendation 10: Impact should include direct impacts, as well as off-site and indirect impacts.

Recommendation 11: Environment includes:

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

Recommendation 12: The Department of Environment and Natural Resources should immediately begin community consultation on TEOs before a Discussion Paper is prepared.

Recommendation 13: Community consultation on TEOs should address whether TEOs or some other test is the best means of protecting the environment as well as achieving good practice principles.

Recommendation 14: Specific types of developments should also be subject to environmental assessment, being identified upfront and placed on a schedule based on factors such as their capacity to cause environmental impacts, capital investment value, location or some combination of these factors.

Assessment processes commensurate with risk

Recommendation 15: Proponents should also have a duty to refer where a project is likely to have a material impact on the environment.

Recommendation 16: Strategic environmental assessment should be based on the following principles:

1. strong legislative standards and science-based tools
2. strong decision making criteria, including a 'maintain or improve' test
3. comprehensive and accurate mapping and data
4. undertake SEA at the earliest possible stage for maximum benefit
5. require alternative scenarios to be considered
6. ground-truthing of landscape-scale assessment is vital
7. mandating public participation at all stages for positive outcomes
8. SEA should complement, not replace, site-level assessment.

Recommendation 17: A strategic environmental assessment of a spatial plan, policy, program or industry should require:

- collation of available information
- identification and filling of critical knowledge gaps
- identification of matters of environmental significance (under the (CTH) *EPBC Act 1999*)
- establishment of outcome objectives for the plan, policy, program or industry
- examination of development and land-use options (so as to minimise impacts on protected matters and retain ecological integrity)
- an analysis of the consequences of the different options
- analysis of how cumulative impacts will be dealt with, including under future scenarios
- a description of mitigation measures, and quantification of expected benefits
- a description of adaptive management approaches in the plan, policy program or industry.

Recommendation 18: NT EPA should provide appropriate financial and technical support to Aboriginal communities and other affected groups and persons to prepare and implement SEA proposals which meet legislative and public policy goals.

Quality of information used in decision making processes

Recommendation 19: The preparation of a scorecard about the adequacy of environmental assessment documents should be mandatory, rather than discretionary.

Recommendation 20: The scorecard should be used at both draft and final stages of the EIS document.

Recommendation 21: Adequacy should include whether the environmental assessment is in plain English and meets accepted readability standards.

Recommendation 22: There should be a requirement to consider whether a proponent is a fit and proper person, based on the NSW model, but also including whether the person or entity had committed offences under the (NT) *Northern Territory Aboriginal Sacred Sites Act*.

Recommendation 23: There should be public disclosure of government decision making throughout the assessment and approval process including:

- referrals
- draft and final Terms of Reference
- draft and final EIS
- draft and final environmental assessment report
- final environmental approval only.

Recommendation 24: There should NOT be public or proponent disclosure of the draft environmental approval.

Recommendation 25: The environmental offence and penalty structure in the Northern Territory should be reviewed and simplified with a view to setting a clear and consistent framework capable of delivering the public policy ends sought under a system of self-assessment.

Recommendation 26: The quantum for environmental offences and penalties in the Northern Territory should be doubled to ensure deterrence.

Recommendation 27: There should be a flexible range of orders available to enforcement authorities and courts including requiring an offender:

- to publicise the offence
- undertake an environmental restoration project
- carry out an environmental audit
- attend a training course.

Recommendation 28: There should be penalty-for-profit provisions to deter non-referrals and other behaviours which could lead to harm to the environment.

Recommendation 29: The Department of Environment and Natural Resources should establish a Steering Committee to explore the best model for the Northern Territory.

Recommendation 30: Climate change should be integrated into the assessment and approval process. This should include:

- scoping the proposal - ensuring potential greenhouse gas emissions are consistently and adequately scoped in project development
- developing standard environmental assessment requirements for greenhouse gas emissions
- preparing the environmental impact statement – assessing estimated greenhouse gas emissions and developing mitigation actions (avoid, minimise, manage, offset)
- evaluating the proposal impacts and merits against any Territory targets or aspirations
- determining the proposal – ensuring greenhouse gas emissions are part of the overall consideration by decision makers.

Recommendation 31: ESD should be integrated into the assessment and approval process, including:

- as an object to be achieved
- requiring decision makers to make decisions that further the objects of, and legislative targets under, legislation
- requiring decision makers to take ESD into account when assessing and approving projects
- requiring decision makers to ensure ecological integrity (maintain or improve environmental values) before approving developments under a strategic assessment approach.

Recommendation 32: Guidelines on social impact assessment and improved valuation and pricing should be considered to assist in the quality of information and decision making.

Recommendation 33: The objects of the new environmental assessment legislation should include recognition of the role of Indigenous people in the conservation and ecologically sustainable use of natural and cultural resources.

Recommendation 34: There should be a requirement that traditional knowledge be integrated into all phases of environmental assessment, in collaboration with, and with the permission and oversight of, Aboriginal communities and Traditional Owners.

Recommendation 35: The legislation should confirm Aboriginal ownership of traditional knowledge and include provisions to protect Indigenous knowledge from and against its unauthorised use, disclosure or release.

Recommendation 36: The legislation should include an obligation on the proponent to consider how they engage with Aboriginal communities and Traditional Owners and that they:

- work with the community during planning and conducting its research
- seek the prior and informed consent of the community prior to acquisition of information
- collect traditional Aboriginal knowledge in collaboration with the community
- respect traditional Aboriginal knowledge and Aboriginal intellectual property rights, and
- bring traditional Aboriginal knowledge and scientific knowledge together.

Encouraging public participation

Recommendation 37: There should be public consultation throughout the assessment and approval process including:

- referrals
- draft and final terms of reference
- draft and final EIS
- draft and final environmental assessment report
- final environmental approval only.

Recommendation 38: There should NOT be public or proponent consultation on the draft environmental approval.

Recommendation 39: Proponents should be required – under legislation - to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter.

Recommendation 40: A key element of the consultation report and engagement plan needs to involve engaging with Aboriginal communities.

Recommendation 41: Engagement with Aboriginal communities needs to be done in accordance with established guidelines that include guidance on matters such as:

- 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
- resources provided to facilitate engagement.

Recommendation 42: Failure to complete consultation reports and engagement plans adequately (for example, in accordance with the guidelines) should be part of the adequacy review conducted by NT EPA.

Recommendation 43: Land Councils should have a concurrence role in the adequacy review conducted by NT EPA., specifically determining the adequacy of the consultation report and engagement plan where Aboriginal consultation is required.

Recommendation 44: Timeframes should be staggered – according to legislative requirements - for different projects, depending on their size and significance

Recommendation 45: NT EPA should have the discretion to extend timeframes based on the consideration of factors such as size, significance, cultural practices, weather and remoteness.

Recommendation 46 (in the alternative): NT EPA should make an upfront determination of the appropriate timeframe for particular projects, based on the referral documents, consultation report and an assessment of such factors.

Recommendation 47: NT EPA should have the power to 'stop the clock' where the consultation report is assessed as inadequate and/or important information is presented or uncovered during the assessment process.

Improving environmental outcomes and accountability

Recommendation 48: The Minister should issue all environmental approvals, based on publicly available advice from NT EPA.

Recommendation 49: The requirement to give reasons should include a statement in writing setting out:

- the findings on material questions of fact
- referring to the evidence or other material on which those findings were based
- giving the reasons for the decision.

Recommendation 50: It should be an offence to provide information in the assessment and approval process which is false and misleading, either knowingly, recklessly or negligently.

Recommendation 51: Significant penalties should attach to this offence, which can be graded depending on intention.

Making the best use of our community's eyes and ears

Recommendation 52: Any person may refer a proposal to the EPA for assessment if it thinks it may have a significant impact on the environment.

Recommendation 53: Referrals should be made as soon as practicable.

Recommendation 54: Referrals are to be made public.

Recommendation 55: Referrals need to comply with simple guidelines.

Recommendation 56: Consultation reports and engagement plans should be lodged when referring a matter.

Recommendation 57: A formal public response to the referral should be required (by NT EPA), except in exceptional circumstances.

Recommendation 58: In exceptional circumstances, NT EPA would be able to dismiss a referral through declaring it a referral without foundation.

Recommendation 59: A referral should operate to "stop the clock", meaning other approvals would need to wait for a referral decision.

Recommendation 60: NT EPA and/or the Minister should have a 'call in' power.

Recommendation 61 (in the alternative): A combination of organisations and entities be empowered to refer matters – namely:

- Land Councils, Prescribed Bodies Corporate, government agencies, particular environment and industry groups (through formal authorisation)
- affected stakeholders (as of right).

Introducing review processes

Recommendation 62: The following assessment decisions should be reviewable:

- whether a proposed activity should have been referred
- whether a proposed amendment should have been referred
- if so, the assessment method required.

Recommendation 63: The following approval decisions should be reviewable:

- whether to approve a proposed activity, including any conditions proposed
- whether to approve a proposed amendment, including any conditions imposed.

Recommendation 64: The ground under which judicial review can be sought should be established under legislation, in line with the federal approach.

Recommendation 65: The following people and groups should have standing for merits review:

- proponents
- affected stakeholders (such as neighbours or peopled downstream from a development)
- particular environment and industry groups
- Land Councils and local governments
- Prescribed Bodies Corporate
- a person who made a substantive submission throughout the referral process.

Recommendation 66: Any person should be able to bring proceedings to remedy or restrain a breach of an environmental law, or to stop harm to the environment.

Recommendation 67 (in the alternative): As with merits review, the following people and groups should have standing for judicial review and enforcement:

- proponents
- affected stakeholders (such as neighbours or peopled downstream from a development)
- particular environment and industry groups
- Land Councils and local governments
- Prescribed Bodies Corporate
- a person who made a substantive submission throughout the referral process.

Recommendation 68: Standing should also be extended to others in limited circumstances, such as where it is in the public interest or the interests of justice to do so.

Recommendation 69: The Northern Territory Civil and Administrative Tribunal (NTCAT) should deal with merits review.

Recommendation 70: The Supreme Court should deal with judicial review matters.

Recommendation 71: The existing protections against vexatious litigants and proceedings be maintained.

Recommendation 72: Where public interest litigation is undertaken, access to justice should be facilitated through procedural reforms including changes in the following areas - the normal rules on costs, undertakings for damages and security for costs.

Roles and responsibilities

Recommendation 73: NT EPA - an independent regulator established under statute – should be retained.

Recommendation 74: NT EPA should exercise advisory, assessment and regulatory functions.

Recommendation 75: Enhanced funding should be made available to NT EPA to enable it to exercise its advisory, assessment and regulatory functions.

Recommendation 76: NT EPA should explore user pays models to undertake its functions.

Recommendation 77: NT EPA should explore engaging an experienced environmental counsel to provide advice on regulatory and enforcement functions.

Recommendation 78: NT EPA should ensure that membership of its Board values Indigenous traditional knowledge and participation by ensuring direct Aboriginal representation on this basis.

Recommendation 79: NT EPA should establish an Indigenous Advisory Committee under legislation to advise on the operation of the new reforms.

Recommendation 80: Changes to the NT EPA governance structure should be undertaken in close consultation with Aboriginal communities.

Introducing environmental offsets

Recommendation 81: The Department of Environment and Natural Resources should immediately begin community consultation on environmental offsets before a Discussion Paper is prepared.

Recommendation 82: These consultations should form the basis of a Discussion Paper on offsets, including principles and mechanisms to give clear guidance on the scope and application of the scheme and to address ecological, social and equity considerations.

Recommendation 83: Consultation should be ongoing, including the establishment of an independent Steering Committee with oversight and advisory functions.

Introduction

Background

In 2014, Dr Allan Hawke AC, was asked to undertake an Inquiry into Hydraulic Fracturing (the Inquiry) in the Northern Territory. A key recommendation arising from the Inquiry was that the Government "restructure the (NT) Environmental Assessment Act in the light of this Report and the proposed bilateral agreements with the Commonwealth on environmental assessments and approvals".

This finding triggered a second review from Dr Hawke (hereafter the Hawke II Review). The Hawke II review identified a number of concerns with the existing process including:

- uncertainty
- capacity constraints
- inconsistency and inequity
- lack of transparency
- ambiguity
- sectoral capture
- compliance.[1]

These concerns are echoed by a range of stakeholders, from EDO NT to the Minerals Council of Australia (NT Division). The general consensus is that there is an urgent need for reform.

The Hawke Review II identified three options to clarify the Territory's environmental decision making roles to ensure a robust environmental regulatory system:

Option 1 - retain the current system with incremental improvements
Option 2 - create a single environment approval process with the Environment Minister as decision maker
Option 3 - strengthen the sectoral 'one-stop-shop' model, supported by enhanced transparency and independent performance monitoring.

The Hawke Review II ultimately favoured Option 3, although it did note the advantages of Option 2. It stated:

> This model [Option 3] provides the best means of:
>
> - improving the cost-effective, transparent and efficient implementation of the environmental assessment and approvals system
> - meeting the requirements necessary for implementation of the Commonwealth's 'one-stop-shop'
> - maximising structural and administrative efficiencies
> - enhancing environmental standards, while delivering reduced regulatory timeframes, duplication and uncertainty.[2]

[1] Hawke A (2015) *Review of the Northern Territory Environmental Assessment and Approval Processes* at p v.
[2] Hawke A (2015) *Review of the Northern Territory Environmental Assessment and Approval Processes* at p vi.

It also went on to note that adopting Option 3 would not preclude a scheme based on Option 2 in the future.

In its response to the Hawke Review II, the previous Northern Territory Government agreed to adopt Option 3 and stated that it broadly supported each of the 22 reform recommendations. This commitment remains on the Northern Territory Government website: https://denr.nt.gov.au/environment-information/environmental-policy-and-reform/hawke-ii-review

The Northern Territory Environment Protection Authority (NT EPA) provided a response to the Hawke Review II – a draft advice followed by its Roadmap for a Modern Environmental Regulatory Framework for the Northern Territory. In both these responses, it favoured the adoption of Option 2.

This Discussion Paper is derived from this history, and seeks to forge a regulatory reform path in light of these developments.

In light of the history, breadth and complexity of this regulatory reform process, it is crucial that there is ongoing consultation which is both ongoing and fulsome, with clear and realistic timeframes

Structure of this report

This report broadly follows the structure of the Environmental Regulatory Reform Discussion Paper. It addresses the topic and themes as follows:

- The road to reform
- Purpose and principles of assessment systems
- Defined assessment triggers
- Assessment processes commensurate with risk
- Quality of information used in decision making processes
- Encouraging public participation
- Improving environmental outcomes and accountability
- Making the best use of our community's eyes and ears
- Introducing review (appeals) processes
- Roles and responsibilities
- Introducing environmental offsets
- Other issues

Within each of these topics and themes following structure is adopted.

First, the report briefly describes the proposal as it is understood **- The proposal**

Second, the report then analyses the proposal with reference to the questions in the Discussion Paper **- The analysis**

Third, the report makes recommendations based on this analysis - **Recommendations**

Topic and theme

The road to reform

The proposal

The Roadmap for a modern environmental regulatory framework for the Northern Territory put forward by the NT EPA (the Roadmap) envisages a key role for an independent NT EPA in administering the environmental laws in the NT. It makes seven recommendations which cover reforms to environmental assessment and pollution management laws. These recommendations are attached as **Annexure A**.

The Roadmap suggests reforms to the environmental assessment legislation to adopt a framework for a single, whole-of-government environmental approval issued by the NT Minister for Environment and Natural Resources.

NT EPA would conduct the environmental impact assessment for proposals that may have a significant impact on the environment, as well as conduct strategic environmental assessments. In addition, the NT EPA would have an advisory role on matters of environmental importance.

Furthermore, NT EPA would be empowered to issue all licences and approvals to discharge or emit wastes to land, water, sea or into the air. It would also exercise the traditional functions of regulating activities that may have significant impacts or risks to the environment.

The analysis

Questions to consider:
Please provide any comments you may have on the NT EPA's Roadmap

This report agrees with the general appetite for reform of environmental regulation in the Northern Territory. The current regulatory framework is outdated, and various reports in recent years are replete with examples of inconsistency, ineptitude and even disregard for the rule of law. High profile examples like MacArthur River Mine, Western Desert Haul Road and Bootu Mine show the need for legal, policy and cultural change. Laws cannot operate effectively without community trust and confidence and it is clear that there is little faith left in the current system.

It is arguable that the current reform process offers a once-in-a-generation opportunity for genuine and long-lasting reform. In this light, it is equally important the changes are not rushed through and that the importance of meaningful community participation is recognised, both as a means of ensuring the laws are sound and workable and that the community is on board with their direction.

Given the nature of the changes, it is important that consultation is iterative and ongoing. The sheer breadth and complexity of issues – and the lassitude of the system for many years – makes considered participation, comment and engagement difficult. An iterative process – which builds on the previous stage, delineates controversial and non-controversial issues and amplifies understandings and consensus – offers the best way forward. In terms of the current process, this would logically be an Exposure Draft of the Environmental Assessment Bill with an accompanying paper that explains the principles, logic and decisions that have underpinned it. For those matters where consensus has not been reached, further parallel consultation processes could run alongside this, ensuring that momentum is not lost but that key issues have not been brushed aside.

The NT EPA's Roadmap principal recommendation supports Option 2, arriving at a different conclusion to that of Hawke Review II, which favours Option 3. As noted above, the previous Northern Territory government agreed to adopt Option 3 as well as providing broad support for each of the 22 reform recommendations. This commitment remains on the Northern Territory government website.[3] Other recommendations relate to roles and responsibilities and are dealt with below.

Notwithstanding the change of government, it would seem that the current government remains committed to Option 3. At the same time, this seems inconsistent with them actively seeking views on the NT EPA's Roadmap.

In light of this uncertainty, it is worth making the following observations and recommendations.

First, Hawke Review II stated:

> Adopting Option 3 now would not preclude moving to a regime like that set out in Option 2 at a later time.[4]

Second, the Hawke Review II conclusion was largely on pragmatic grounds. In summarising Option 2, it noted the evident advantages:

> Creation of a single environmental authorisation would have benefits in terms of clarity of process and responsibilities.[5]

However, it then went onto say:

> Albeit, a separate environmental approval for developments would be a very significant change to the NT's project approval framework and would represent a marked shift in policy. It is a particularly resource-intensive approach and would likely result in the need to duplicate resources available to the EPA and other Ministers. In a small jurisdiction like the NT, this is a problematic proposition and not necessarily one that delivers the best outcome.[6]

[3] https://denr.nt.gov.au/environment-information/environmental-policy-and-reform/hawke-ii-review.
[4] Hawke A (2015) *Review of the Northern Territory Environmental Assessment and Approval Processes* at p 15.
[5] Hawke A (2015) *Review of the Northern Territory Environmental Assessment and Approval Processes* at p vi.
[6] Hawke A (2015) *Review of the Northern Territory Environmental Assessment and Approval Processes* at p vi.

This observation in the Executive Summary – pivotal to the adoption of Option 3 - was only briefly expanded on in Chapter 3. Here Hawke Review II reiterates the observation that a separate environmental approval would be 'a marked shift in policy' and states:

> Accordingly, there would need to be quite significant changes to departmental and administrative arrangements, including personnel supporting the approval of major developments. Such administrative changes may require additional resources.[7]

Beyond this, however, Hawke Review II does not expand on, or analyse further, what these resource implications may be. For example, there is no recognition that the main effect of a separate environmental approval may be – in part or wholly – a need to redistribute resources. This is a very different proposition to a resource burden. It may mean, for example, that staff need to be seconded into, or transferred across to, NT EPA.

This lack of evidence-base for Option 3 is telling. The only other basis in favour of Option 3 over Option 2 is that the latter would be a more radical shift. However, it is also clear that – for the past 7 years - the Northern Territory has been in the midst of a comprehensive reform agenda. This is not a coincidence, arising out of widespread dissatisfaction with the operation of the current system.

To be trite, comprehensive reform agendas are precisely the time to put in place comprehensive reforms. Put another way, there seems to be little point in adopting a sub-optimal policy option which possesses many of the negative attributes of the present system. As EDO NT has previously identified:

> The Draft Advice sets out clearly the disadvantages of both the current regime and the Hawke proposed, Sectoral Framework. Broadly, the Draft Advice identifies that the current system and the Sectoral Framework:
>
> - are highly fragmented across numerous inconsistent pieces of legislation and a patchwork of different agencies with different aims
> - promote inefficiency and ineffectiveness
> - feature unacceptable conflicts of interest/perceived conflicts of interest
> - results in and is likely to result in the continued ineffectiveness of environmental assessment in the NT.[8]
>
> The EDO accepts and agrees with the criticism the Draft Advice makes of the Sectoral Framework. We also agree that it is difficult to understand the rationale for the Sectoral Framework which will require more work, generate greater uncertainty and will fail to eliminate many of the problems (particularly related to conflicts) with the current regime.

[7] Hawke A (2015) *Review of the Northern Territory Environmental Assessment and Approval Processes* at p 12.
[8] EDO NT (2016) *Response to the draft advice of the NT EPA about recommended reforms for the Territory's environment legislation* at p 5.

By contrast, as NT EPA has stated:

> Implementation of a single environmental approval is the easiest and most practical path for reform. It would achieve the reform's objectives, engender Territorians' trust and confidence, and provide certainty for industry and sound environmental outcomes for the Territory's unique environment. These outcomes are the linchpins of the Territory's future prosperity and the Territory lifestyle.[9]

A single environmental approval will not supplant the need for other approvals – such as the grant of a mining interest under land rights legislation[10] – but it will be a prerequisite for approval in relation to environmental matters.

On the basis of the above, and in light of the uncertainty around the position of the Northern Territory government, this report strongly recommends adopting Option 2.

Alternatively, it is recommended that Option 2 be built into the current environmental regulatory reform agenda as Stage 3. Option 3 could be put in place as soon as practicable with a resolve to transition to Option 2 in, say, three years. This will allow time for the resource implications of this model to be identified and assessed, and for any cultural issues around change to be worked through.

The Discussion Paper also refers to the fact that the proposed system takes into consideration the federal government's requirements under the (CTH) Environment Protection and Biodiversity Conservation Act 1999 (the (CTH) EPBC ACT 1999), particularly around maximising efficiencies and minimising inconsistencies for business. In this regard, it is important to emphasise that the federal government has an important gatekeeper role in relation to the protection of the environment, and also that the NT has a limited capacity to assess, advise and regulate these matters. On this basis, it is not recommended that the NT government enter into a bilateral approval with the federal government.

[9] NT EPA (2016) Draft Advice Regarding Dr Allan Hawke's Review of the Northern Territory's Environmental Assessment and Approval Processes at p ix.
[10] (CTH) *Aboriginal Land Rights (Northern Territory) Act 1976* s 46.

Recommendations: The road to reform

Recommendation 1: Create a single environment approval process with the Environment Minister as decision maker (as per Option 2 of Hawke Review II).

Recommendation 2 (in the alternative): Build Option 2 into the current environmental regulatory reform agenda as Stage 3, allowing time to transition and, in particular, for the resource implications of this model to be identified and assessed and worked through.

Recommendation 3: The NT government should not enter into bilateral agreements with the federal government to assume responsibility for the approval of actions which trigger the federal environmental assessment regime.

Topic and theme

Purpose and principles of assessment systems

The proposal

The reforms contain a suite of new ideas that straddle the chronology of the planning system. At the strategic planning stage, strategic environmental assessments will be introduced.

At the referral stage, any project with the potential for direct or indirect impact on the environment will need to be referred by the proponent to the NT EPA. The NT EPA will determine whether an environmental approval will be required and the level of environmental assessment (based on the environmental risks of the project). In addition to self-assessment, responsible agencies as well as the NT EPA will have the power to refer and call in a project.

The reforms will be backed by compliance and enforcement provisions – such as offences, penalties and stop work orders – that will seek to ensure that matters are appropriately referred and breaches can be acted upon.

Central to the new system will be the development of Territory Environmental Objectives (TEOs), which will identify matters and places that are significant to the Territory. These will operate across the environmental assessment system guiding environmental assessment and approvals – for example, they will act as triggers, operate as matters for consideration, and inform conditions and compliance action.

The analysis

This topic and theme essentially provides an overview of the proposed reform process. It identifies the key elements of this process, such as strategic environmental assessment, the trigger for referral and the need for an environmental approval, powers of referral, compliance and enforcement and the development of TEOs. All these elements are analysed below under more specific topics and themes.

However, at this point it is worth reiterating the issues identified by the people of the Northern Territory as set out in the Discussion Paper such as:

- the importance for clarity around the purpose of EIA, including the need to:
  - avoid significant adverse impacts
  - assess direct and indirect impacts
  - assess immediate and long-term impacts
  - recognise the breadth of impacts (environmental, social, cultural, health, cumulative)

- the need to consider climate change
- the relationship between strategic planning and EIA
- the centrality of ecologically sustainable development
- the need to focus on governance, including transparency, clarity, accountability, efficiency, effectiveness, timeliness, risk assessment and enforceability
- the fundamental importance of community participation.

Recommendations: Purpose and principles of assessment systems

Not applicable – addressed elsewhere

Topic and theme

Defined assessment triggers

The proposal

The proposal envisages that an activity that is likely to have a significant impact on the environment (or, more particularly, TEOs) will be brought within the (NT) *Environmental Assessment Act* and assessed as to whether an environmental approval is required.

Proponents will undertake a self-assessment of their project to determine whether there is a need for referral.

As noted above, central to the new system will be the development of Territory Environmental Objectives (TEOs). These are proposed to be either Territory wide or specific to a species, place or region (such as Kakadu). Amongst other things, these will operate as triggers for the environmental assessment process. The idea is that they will reflect the broad definition of the environment, covering biodiversity, land management, water quality and use, air quality, marine environment, economic growth and stability, climate change, waste and resource recovery, and cultural and social values.

The Minister will establish TEOs and they will be gazetted. Guidelines will be developed to support the operation of the TEOs.

Running alongside this system, it is proposed that specific developments will require an environmental approval.

The analysis

This section looks at the following issues:

- self-assessment
- key terms
- Territory Environmental Objectives (TEOs)
- specific developments requiring an environmental approval

Self-assessment

It is crucial to the integrity of the environmental assessment reforms that a system based on self-assessment is backed by a comprehensive set of compliance and enforcement measures to ensure that referrals are properly made.

In particular, at the gateway stage, failure to refer a matter and to obtain approval must mean that the action is unlawful and the person or organisation carrying out the activity may be prosecuted, or fined, or an injunction may be granted to stop the action.

For this model to work effectively, it must also include the following elements:

- significant criminal and civil penalties for non-referral
- broad standing provisions to halt a breach of environmental laws or challenge a failure to refer
- penalty-for-profit provisions where orders can be made imposing penalties based on the amount of profit made as a result of a non-referral.

These three elements are addressed below.

Key terms

In many jurisdictions, the environmental impact assessment regime is based around the pivotal issue of whether an activity is likely to have a significant impact on the environment. Consequently, the key elements of this phrase have been the subject of a considerable amount of analysis, litigation and learning over the past 30 years, and are now somewhat settled.

In order to avoid litigation on these matters, it is suggested that the settled definition is adopted where possible. Furthermore, in relation to the environment, a broad definition is supported. For example, under the (CTH) EPBC Act 1999 environment is defined inclusively as:

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

A broad definition ensures that environment is defined not only in biophysical terms, but also in social, cultural and economic aspects. On this basis, the following definitions are recommended:

Table 1: Definitions for assessment triggers

Term	Definition
Activity	an activity should be defined broadly to include a development, project, plan, program, policy, operation, undertaking, change in land use, or an amendment of any of these things[11]
Likely	this should include a real or not remote chance or possibility
Significant	important, notable or of consequence, having regard to its context and intensity
Impact	in addition to direct impacts, this should include off-site and indirect impacts[12]
Environment	Includes: a. ecosystems and their constituent parts, including people and communities b. natural and physical resources c. the qualities and characteristics of locations, places and areas d. heritage values of places e. the social, economic and cultural aspects of a thing mentioned in paragraph a, b, c or d.

[11] See definition of "action" in the (CTH) *Environment Protection and Biodiversity Conservation Act 1999* s 523.
[12] See (CTH) *Environment Protection and Biodiversity Conservation Act 1999* at s 527E.

Territory Environmental Objectives (TEOs)

TEOS are clearly an integral part of the new system. It is of considerable concern that they have not been included in this Discussion Paper, as their efficacy or otherwise will have a profound effect on the operation of the new system.

In this regard, it is suggested that consultation on TEOs should begin prior to the development of draft TEOs. This deliberative approach will help to ensure that the community is more fully engaged in defining what the issues are, rather than in commenting on the government's agenda. As has been said:

> Consultation processes are often perceived as a barrier to change, while the constitution of the consultation process itself is wrong. The public is never engaged in the problem definition (why should this project be developed?), but only in the 'how are we going to develop this project' phase of consultation.

Furthermore, this report has two concerns about the use of Territory Objectives (particularly as a trigger).

The first concern is that the use of TEOs unnecessarily complicates matters. To a large extent, the notion seems to be based on ensuring that a large amount of unnecessary information is not supplied in the referral stage. This concern is shared by many, with voluminous EISs either inadvertently or deliberately making community participation and good decision making difficult in an environmental assessment and approval context. However, this problem could arguably be better dealt with by the current simpler test - for example, significant impact on the environment – coupled with greater administrative guidance about what should be addressed and a strong commitment to plain English versions of EIS documents. In this context, administrative guidance can mean guidelines about significant impact (like as used under federal legislation) coupled with Environmental Assessment Requirements (used in NSW to address matters specific to the project).

The second concern is that the use of TEOs skews the analysis – that is, only triggers are assessed. Once again, where an impact is less than significant, no assessment is undertaken.

This is the position under federal legislation; in deciding what sort of assessment is required (and whether to approve an action), the Minister can only consider those environmental impacts which are caught by the (CTH) EPBC Act 1999, that is, those which relate to a matter of national environmental significance, Commonwealth land or an action by the Commonwealth.

In short, it is not clear that TEOs offer the best means of protecting the environment as well as achieving a number of the good practice principles identified in Hawke Review II, such as certainty and efficiency.

If TEOs are going to be used, it is suggested that examples of potential triggers include where there is a significant impact on water (e.g. shale gas) or where there is a significant impact on an Indigenous Protected Area (IPA). Likewise, as part of a schedule all near-shore petroleum and mineral exploration and production/mining activities should be listed.

Specific developments requiring an environmental approval

A system whereby specific developments require an environmental approval, and thus environmental assessment, is supported. This categorical approach can operate in conjunction with the more subjective 'significant impact' test operating as a safety net. Specific developments should be identified and placed on a schedule based on factors such as their capacity to cause environmental impacts, capital investment value, location or some combination of these factors.

Recommendations: Defined assessment triggers

Recommendation 4: The failure to refer a relevant activity and to obtain approval is an offence.

Recommendation 5: The person or organisation carrying out the activity may be either prosecuted or fined, depending on culpability.

Recommendation 6: Significant penalties should be in place to deter proponents from failing to refer.

Recommendation 7: An activity should be defined broadly to include a development, project, plan, program, policy, operation, undertaking, change in land use, or an amendment of any of these things.

Recommendation 8: Likely should include a real or not remote chance or possibility.

Recommendation 9: Significant should be defined as important, notable or of consequence, having regard to its context and intensity.

Recommendation 10: Impact should include direct impacts, as well as off-site and indirect impacts.

Recommendation 11: 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).

Recommendation 12: The Department of Environment and Natural Resources should immediately begin community consultation on TEOs before a Discussion Paper is prepared.

Recommendation 13: Community consultation on TEOs should address whether TEOs or some other test is the best means of protecting the environment as well as achieving good practice principles.

Recommendation 14: Specific types of developments should also be subject to environmental assessment, being identified upfront and placed on a schedule based on factors such as their capacity to cause environmental impacts, capital investment value, location or some combination of these factors.

Topic and theme

Assessment processes commensurate with risk

The proposal

The level of environmental assessment will reflect the risk of likely impact on the environment and traverse the following:

- Assessment through referral (and/or supplementary) information
- Environmental Impact Statement
- Public inquiry
- Strategic environmental assessment.

The analysis

Level of assessment

It is entirely appropriate that the level of environmental assessment relates to the risk of likely impact on the environment. This approach is adopted world-wide.

However, less common is that the trigger for any level of environmental assessment – or a need for an environmental approval - is whether there is a significant impact on the environment (or on TEOs).

Under the federal guidelines:

> A significant impact is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.

Conceptually, there is therefore a large gap between zero or negligible impact and significant impact. This gap means, in effect, that projects where there is less than a significant impact on the environment are not subject to formal environmental assessment.

It is submitted that this model is less than ideal. First, while this is the approach taken in Western Australia, the model there is 'last generation', dating back to the mid-1980s. Second, this model also echoes the federal approach. However, the roles are different, with the federal government having a gatekeeper role vis-à-vis the states and territories in assessing matters of national significance. In other words, the federal approach runs parallel to state and territory regulation and, in this respect, is not transferable and applicable to the Northern Territory.

It is suggested that proponents also have a duty to refer where a project is likely to have a material impact on the environment. For simplicity, material impact can be defined as more than negligible but less than significant. In this scenario, the proponent must provide a basic level of assessment to ensure that there are no adverse impacts on the environment.

Strategic environmental assessment

The Productivity Commission has noted that strategic environmental assessment can mean different things to different people – it stated:

> In the Commission's view, strategic assessment is best understood as a broad concept that covers assessments of the potential impacts of plans, policies and programs across an entire region, catchment area, activity or industry.[13]

This seems to closely mirror the model envisaged in the Discussion Paper. As identified under the relevant international convention, it is also crucial that strategic environmental assessment includes community involvement as part of its definition:

> The evaluation of the likely environmental, including health, effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.[14]

Strategic environmental assessment potentially offers significant benefits for sustainable outcomes including:

- early consideration of matters in the planning process, or where an industry-wide program is to be implemented
- greater certainty for local communities and developers over future development
- support for Aboriginal landowners to determine their own futures, including through 'whole of country' land use planning
- reduced administrative burden for proponents and governments
- increased capacity to achieve better environmental outcomes and address impacts at the landscape scale.

For these reasons, there has been increased use of strategic environmental assessment across Australia and it has been supported by, amongst others, the Productivity Commission and the Hawke Review on the (CTH) EPBC Act 1999.[15]

However, it is also true that strategic environmental assessment has had a somewhat patchy history in Australia so far. Based on the strategic assessments undertaken across Australia to date, the following lessons can be drawn:

---

[13] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 318.
[14] Article 2(6) of the *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*.
[15] See, for example, Hawke Review II recommendations 15 and 17 and Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at Chapter 11.

- the process should commence early to achieve maximum benefits
- there should be meaningful public engagement
- public engagement should be proportionate to the scale of the proposal
- the assessment should deal with alternative scenarios
- scenario testing tends to help greatly
- the process should be evidence-based
- costs - for surveying and consultation – tend to be much higher than expected
- the approach should add value to existing plans.[16]

In light of this history, attention has been drawn to some of the risk and inadequacies of strategic assessments to date. ANEDO identifies 8 principles to ensure good process, standards and implementation:

1. strong legislative standards and science-based tools
2. strong decision making criteria, including a 'maintain or improve' test
3. comprehensive and accurate mapping and data
4. undertake SEA at the earliest possible stage for maximum benefit
5. require alternative scenarios to be considered
6. ground-truthing of landscape-scale assessment is vital
7. mandating public participation at all stages for positive outcomes
8. SEA should complement, not replace, site-level assessment.[17]

In this regard, principle 8 is crucial. Strategic environmental assessment should facilitate good decision making and environmental outcomes, ensuring less problems down the track rather than the diminution in rights.

Likewise, experience in Melbourne and Perth and Peel have highlighted that a strategic environmental assessment of a spatial plan, policy, program or industry should, at minimum, require:

- collation of available information
- identification and filling of critical knowledge gaps
- identification of matters of environmental significance (under the (CTH) *EPBC Act 1999*)
- establishment of outcome objectives for the plan, policy, program or industry
- examination of development and land-use options (so as to minimise impacts on protected matters and retain ecological integrity)
- an analysis of the consequences of the different options
- analysis of how cumulative impacts will be dealt with, including under future scenarios
- a description of mitigation measures, and quantification of expected benefits
- a description of adaptive management approaches in the plan, policy or program.[18]

Finally, where Aboriginal communities are concerned, potential benefits – such as 'whole of country' land use planning - are unlikely to be realised without support from government agencies, both financial and technical.

[16] These conclusions were drawn from a separate consultancy examining the efficacy of taking a strategic environmental assessment approach to planning in the Greater Sydney Region in NSW.
[17] ANEDO (2013) *Submission on Productivity Commission Draft Report – Major Project Development Assessment Processes* at pp 55-57.
[18] Again, these conclusions were drawn from a separate consultancy examining the efficacy of taking a strategic environmental assessment approach to planning in the Greater Sydney Region in NSW.

Recommendations: Assessment processes commensurate with risk

Recommendation 15: Proponents should also have a duty to refer where a project is likely to have a material impact on the environment.

Recommendation 16: Strategic environmental assessment should be based on the following principles:

1. strong legislative standards and science-based tools
2. strong decision making criteria, including a 'maintain or improve' test
3. comprehensive and accurate mapping and data
4. undertake SEA at the earliest possible stage for maximum benefit
5. require alternative scenarios to be considered
6. ground-truthing of landscape-scale assessment is vital
7. mandating public participation at all stages for positive outcomes
8. SEA should complement, not replace, site-level assessment.[19]

Recommendation 17: A strategic environmental assessment of a spatial plan, policy, program or industry should require:

- collation of available information
- identification and filling of critical knowledge gaps
- identification of matters of environmental significance (under the (CTH) EPBC Act 1999)
- establishment of outcome objectives for the plan, policy, program or industry
- examination of development and land-use options (so as to minimise impacts on protected matters and retain ecological integrity)
- an analysis of the consequences of the different options
- analysis of how cumulative impacts will be dealt with, including under future scenarios
- a description of mitigation measures, and quantification of expected benefits
- a description of adaptive management approaches in the plan, policy program or industry.

Recommendation 18: NT EPA to provide appropriate financial and technical support to Aboriginal communities and other affected groups and persons to prepare and implement SEA proposals which meet legislative and public policy goals.

Topic and theme

Quality of information used in decision making processes

The proposal

The development of Territory Environmental Objectives (TEOs) will help answer the question of whether a matter should be referred as well as what needs to be done to avoid and minimise the impacts of the proposal.

The NT EPA will be able to prepare a scorecard about the adequacy of environmental assessment documents, and either reject a referral or place more stringent conditions on it if inadequate information is given.

The Minister will be required to consider whether the proponent is a fit and proper person prior to granting an approval.

There will be public disclosure of government decision making throughout the assessment and approval process.

Offences, penalties, stop work orders and false and misleading information provisions will seek to ensure that matters are appropriately referred and adequate information is supplied.

The analysis

Questions to consider:

Question 2: What other initiatives could be introduced to improve the quality of information available in the assessment and approval process?

Question 3: What mechanisms could be introduced to better access and use Indigenous traditional knowledge in the system?

In general terms, the suite of initiatives proposed should go some way to ensuring that the quality of information used in decision making is of a high standard. However, further checks and other initiatives are required. The issue of TEOs is addressed above.

This section is structured as follows.

First, it briefly addresses the key elements above – scorecard, fit and proper person, public disclosure and offences and penalties.

Second, it suggests other initiatives to improve the quality of information.

Third, it suggests mechanisms that could be introduced to better access and use Indigenous traditional knowledge in the system.

Scorecard

The preparation of a scorecard about the adequacy of environmental assessment documents, together with the power to either reject a referral or place more stringent conditions on it if inadequate information is given, is an intriguing proposal.

In particular, it is premised on an understanding of corporations, and ways that publicity and reputation can influence their behaviour.

The use of a scorecard – at both draft and final stages – could be a crucial element in ensuring that any inadequacies re identified and rectified early on so that the environmental assessment process produces high quality information.

Adequacy should not only be defined in terms of coverage and breadth but should also be extended to include whether the environmental assessment is in plain English and meets accepted readability standards.[19]

It is recommended that such a scorecard be mandatory, rather than discretionary.

Fit and proper person

Fit and proper person tests are quite common as a means of determining whether a person should hold rights over and above those of others – for example, liquor licences, legal qualifications, and the right to enter premises.[20]

Similarly, such provisions have been used in environmental law in relation to licensing and approvals. Under the (CTH) EPBC Act 1999, the Minister may consider the person or entity's history in relation to environmental matters.[21] In NSW, whether a person is a fit and proper person is relevant to the granting, suspension and revocation of an environment protection licence.[22] Detailed provisions exist in NSW as to whether a person (or entity) is a fit and proper person including whether they have contravened environmental laws, their record of compliance, whether they are of good repute, whether they have conviction for fraud and dishonesty, whether they have been declared bankrupt or insolvent, their financial capacity and whether any

[19] It is possible to assess documents on their grade level and/or use mechanism such as the SMOG (Simplified Measure of Gobbledygook) calculator: see, for example: http://www.literacytrust.org.uk/about/faqs/710_how_can_i_assess_the_readability_of_my_document_or_write_more_clearly

[20] See, for example, (QLD) *Liquor Act 1992* s 107 and (QLD) *Wine Industry Act 1994* s 9.

[21] (CTH) *Environment Protection and Biodiversity Conservation Act 1999* s 136(4).

[22] (NSW) *Protection of the Environment Operations Act 1997* ss 45(f) and 79(5)(f).

partner is a fit and proper person. The full provision is attached as Annexure B. Other relevant matters would include whether the person or entity had committed offences under the (NT) *Northern Territory Aboriginal Sacred Sites Act*.

Public disclosure

A consistent theme throughout the reform process has been the loss of community confidence in the planning system, and the resolve of the government to restore it.

In this context, the public disclosure of government decision making throughout the assessment and approval process is both appropriate and laudable, and in line with community and business expectations around transparency and accountability.

The exception to this is the draft environmental approval. There are strong public policy grounds for this. This should not be made public, nor given to the proponent, as it may lead to 'lobbying' about the terms of approval. This may lead to a distortion of the regulatory process, as well as potentially making any decision unlawful and beyond the statutory considerations.

Offences and penalties

Compliance and enforcement has a crucial role to play in ensuring that the quality of information used in the process is of a high standard. Put another way, it is imperative that there are significant penalties in place to deter proponents from failing to refer projects. In particular, it is suggested that the new legislation should adopt a tiered penalty framework under the new Act. The framework should include categories of serious offences, mid-range (strict liability) offences and minor (absolute liability) offences.

The rationale for this approach is based on *He Kaw Teh v R*.[23] In this seminal case, the High Court provided guidance on how to interpret criminal offence provisions in statutes. The court classified statutory offences into three tiers:

Tier 1 (serious offences): for these matters, proof of a person's intention (mens rea) is necessary in order to convict a person of a crime. For these matters, significant penalties including gaol are appropriate.

Tier 2 (mid-range offences): these are strict liability matters where only the actus reus (the guilty act causing a proscribed effect) needs to be proved to convict a person of a crime. The only defence to a strict liability offence is a pleading of 'honest and reasonable mistake of fact' (the defendant was not aware of the facts that led to the commission of the offence). For these matters, public policy grounds would support the imposition of significant financial penalties. Gaol is not appropriate.

Tier 3 (minor offences): these are absolute liability matters where there is no defence that can be pleaded. These matters should only attract small fines equivalent to penalty infringement notices.

In broad terms, as the following table shows, the *Environmental Offences and Penalties Act* adopts this typology.

[23] (1985) 157 CLR 523.

Table 2: Offence and penalty structure under NT legislation

Level		Minimum	Maximum
Level 1	individuals	385 PUs $50,050	3,850 PUs $500,500 5 years gaol
	corporations	1,924 PUs $250,120	19,240 PUs $2,501,200
Level 2	individuals	154 PUs $20,020	1,540 PUs $200,200
	corporations	770 PUs $100,100	7,700 PUs $1,001,000
Level 3	individuals	77 PUs $10,010	770 PUs $100,100
	corporations	385 PUs $50,050	3,850 PUs $500,500
Level 4	individuals	--	77 PUs $10,010
	corporations	--	385 PUs $50,050

However, the following can also be said.

First, the approach in the Northern Territory seems unnecessarily complicated.

Second, the maximum penalties for individuals and corporations are – on paper - significant enough to ensure deterrence. However, they could be increased – for example, doubled - on public policy grounds. By way of comparison, under federal environmental laws, a person who takes an action that is likely to have a significant impact on a matter of national environmental significance, without first obtaining approval, can be liable for a civil penalty of up to $900,000 for an individual and $9 million for a body corporate, or for a criminal penalty of seven years imprisonment and/or a penalty of $75,600.

Third, Level 3 and 4 offences can be dealt with by penalty notices, which reduce them substantially.[24]

On this basis, it is recommended that the offence and penalty structure in the Northern Territory be reviewed and simplified with a view to setting a clear and consistent framework capable of delivering the public policy ends sought under a system of self-assessment.

Furthermore, there is a need to ensure that there are a flexible range of orders available to enforcement authorities and courts. Such orders can include publicising the offence in a newspaper, on the company website or in an Annual Report; undertaking an environmental restoration project; carrying out an environmental audit; attending training courses and the like.[25]

[24] Level 3 for individuals is $221 and $1,144 for corporations; level 4 for individuals is $104 or $572 for corporations.
[25] (NSW) *Protection of the Environment Operations Act 1997* s 250.

One powerful order is a penalty-for-profit provision. An example of such a provision is provided by section 249 of the (NSW) Protection of the Environment Operations Act 1997 which states:

1. The court may order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.
2. The amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.

Other initiatives to improve the quality of information

Environmental impact assessment is forever in a state of continuous improvement. In this respect, it is notable that a recent review of environmental assessment in Canada has already flagged broad community support for 'next generation environmental assessment'. The attributes of this include the following:

- broadening the notion of sustainability beyond the traditional triple bottom line to include, health and cultural aspects
- consistent with the above, relabelling assessments as impacts assessments not environmental assessments
- moving away from a (negative and adversarial) focus on significant impacts or effects to an approach which reviews net benefits and a review of trade-offs between benefits and negative effects
- adopting a net benefit test, where a key purpose of impact assessment is to provide assurance that approved projects, plans and policies contribute a net benefit to environmental, social, economic, health and cultural well-being
- devising better ways of assessing alternatives.[26]

While this may be true, it also seems the case that some issues remain intractable. Environmental assessment is an area which has been the subject of ongoing community concern and, in turn, is crucial to ensuring the community's confidence and trust in the planning system. In environmental assessment systems across the world, much of this concern has revolved around the accountability of the process and the standards required of professionals involved in undertaking EIA. As Stewart has noted:

> The relationship between the scientist as an environmental consultant and the developer can be a major cause for concern. The duty of a scientist is to be objective in the presentation of facts. Nevertheless, the old adage that 'he who pays the piper calls the tune' has some relevance. The brief which the consultant is given may severely limit the scope of a technical investigation and editing of the subsequent report may alter its thrust. Prominent consulting firms often subcontract to specialists, such as ecologists, who actually conduct the field studies. Successive drafts of a report may pass through

[26] Government of Canada Expert Panel report (2017) *Building Common Ground: a New Vision for Impact Assessment in Canada* at: https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html

many hands, and the final version may reach conclusions which were not those of the person who did the original work in the field. Such dilution of responsibility is contrary to normal scientific practice.[27]

i. potential alternative models to improve the quality of information under EIA

A number of models to improve information under environmental impact assessment have been suggested and/or tried, including:

- staggered release of key technical documents as they are completed, rather than only at time of EIS release
- voluntary industry schemes with ongoing professional development (Certified Environmental Practitioner [CEnvP] with EIANZ)
- membership schemes with minimum industry standards (including qualifications and the need for 2 years' experience) (as with the Ecological Consultants Association of NSW [ECA])
- upfront assessment of the competency of consultants
- a statutory duty to decision makers and/or the legislative scheme
- an independent accreditation panel to provide advice and play a peer review role
- limiting the percentage of earnings a consultant can make from any one developer over a year
- consultant appointed by lottery or the government agency but paid for by the proponent
- assessment by an independent agency
- funds provided by the proponent to the community to analyse the assessment documents.

In broad terms, these types of models have three advantages over existing approaches.

First, they help to restore the community's confidence in environmental assessment and the planning system in general.

Second, with suitable reform, the transferability and utility of information contained in EIA documents could extend beyond the scope of the project and contribute to a broader baseline of knowledge and information. In these respects, the reform agenda is well-placed to introduce innovative and best practice reforms.

Third, under existing approaches – as Bates has noted – there is a need for "a strong, well-resourced and professionally competent bureaucracy to evaluate the report to ensure that the statement prepared is balanced, honest and reasonable".[28] Given the relative lack of resources in the Northern Territory it is imperative that a range of mechanisms are in place to ensure that the quality of information in EIA documents is of a high standard.

It is recommended that the Department of Environment and Natural Resources establish a Steering Committee to explore the best model for the Northern Territory.

[27] Stewart (1993) "Environmental Risk Assessment: the Divergent Methodologies of Economists, Lawyers and Scientists" 10 EPLJ 10 at p 14.
[28] Bates (2016) *Environmental Law in Australia* at p 464.

ii. Integration of climate change impacts to improve the quality of information under EIA

The Discussion Paper alluded to the consistent feedback about the need to take climate change into account throughout the assessment and approval process. This should include:

- scoping the proposal - ensuring potential greenhouse gas emissions are consistently and adequately scoped in project development
- developing standard environmental assessment requirements for greenhouse gas emissions
- project design – ensuring that predicted climatic events are accommodated and integrated
- preparing the environmental impact statement – assessing estimated greenhouse gas emissions and developing mitigation actions (avoid, minimise, manage, offset)
- evaluating the proposal impacts and merits against any Territory targets or aspirations
- determining the proposal – ensuring greenhouse gas emissions are part of the overall consideration by decision makers.

iii. Integration of ecologically sustainable development to improve the quality of information under EIA

Ecologically sustainable development (or ESD) is an abiding principle in environmental and planning law across Australia today, although its meaning differs within and across jurisdictions. Internationally, recent developments in relation to sustainability include the Paris Agreement 2015 (COP 21), the UN Sustainable Development Goals 2016, the New Urban Agenda 2016 (at Habitats III, Quito October 2016) and 100 Resilient Cities, adopted by Sydney and Melbourne City Councils. In NSW alone, ESD is referred to in around 50 pieces of legislation, mainly under laws administered by environmental, planning and natural resource agencies.

As with climate change, the notion of ESD needs to sit firmly within the environmental assessment and approval process. This will help to ensure that there is clarity and consistency around the quality of information required. Other jurisdictions have tried various models around incorporating ESD into legislation including:

- an object to be promoted[29]
- a matter for consideration in the carrying out functions[30]
- imposing a duty on decision makers to take ESD into account
- a means of framing actions to be undertaken[31]
- a roadmap for how the objects are to be achieved[32]
- an ecological bottom line which needs to be sustained.[33]

[29] (NSW) *Threatened Species Conservation Act 1995* s 3(a)
[30] (NSW) *Greater Sydney Commission Act 2015* s 9(b); (NSW) *Waste Avoidance and Resource Recovery Act 2001* s 6.
[31] (NSW) *Native Vegetation Act 2003* s 3.
[32] (NSW) *National Parks and Wildlife Act 1974* s 2A.
[33] (QLD) *Environment Protection Act 1994* s 3.

Queensland, Victoria and New Zealand have adopted the ecological 'bottom line' approach in their objects. Victoria defines ESD as:

> Ecologically sustainable development is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[34]

New Zealand takes a similar approach in defining its purpose and sustainable management:

1. The purpose of this Act is to promote the sustainable management of natural and physical resources.
2. In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while -
    a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
    b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
    c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.[35]

In NSW, a scientific 'maintain and improve' test has been used to ensure that developments and land clearing are sustainable whereas. South Australia has embarked on a strategic plan which contains a suite of environmental targets.[36]

It is imperative that ESD is integrated throughout the assessment and approval process. This should include it being an object to be achieved; requiring decision makers to make decisions that further the objects of, and legislative targets under, legislation; requiring decision makers to take ESD into account when assessing and approving projects; and, for strategic assessments, requiring decision makers to ensure ecological integrity (maintain or improve environmental values) before approving developments.

iv. Guidelines to improve the quality of information under EIA

In NSW, social impact assessment guidelines are to be introduced for major projects such as State significant mining, petroleum production and extractive industry development. These guidelines are seeking to strengthen the quality of information and analysis available to decision makers and ensure that social impacts are identified, assessed and dealt with in a transparent, consistent and robust manner. The stated objectives are to:

- minimise negative social impacts
- maximise potential benefits
- deliver better outcomes.

---

[34] See (VIC) *Commissioner for Environmental Sustainability Act 2003* s 4(1) and (QLD) *Environment Protection Act 1994* s 3.
[35] (NZ) *Resource Management Act 1991* s 5.
[36] (NSW) *Threatened Species Conservation Act 1995* Part &AA (biocertification) and SA Strategic Plan at http://saplan.org.au/priorities/our-environment

Similar guidelines could be introduced for improved valuation and pricing, one of the key principles of ESD in Australia. This principle seeks to put an economic or financial value on the environment and ecological services. In this respect, it stands in contrast to the intrinsic values of biological diversity and ecological integrity, which is a fundamental consideration.

On this basis, it is recommended that the Department of Environment and Natural Resources should develop guidelines on improved valuation, pricing and incentive mechanisms to assist the EIA process. These mechanisms would require that environmental factors should be included in the valuation of assets and services, such as:

- polluter pays – those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
- the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
- environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

Mechanisms that could be introduced to better access and use Indigenous traditional knowledge

There is a clear need to properly recognise and incorporate traditional knowledge into this reform process. As the Northern Land Council has observed:

> The significance of fully integrating traditional knowledge into the Northern Territory's environmental impact assessment process should not be underestimated. Aboriginal traditional knowledge has developed over millennia and is key to management of a variety of specific environments, yet it remains largely ignored by industry and by environmental scientists and managers. This is the outcome of ineffective policies that have been implemented without consideration of the value of traditional knowledge, and how it can be respectfully acquired and utilised to improve conservation of the Northern Territory environments.[37]

Traditional knowledge can assist in the environmental assessment process in many ways - for example:

- provide historical information about the place
- help recognise possible environmental impacts
- help improve project design, including of future projects and programs
- strengthen potential mitigation measures
- lead to better decisions
- help increase the capacity of Aboriginal communities to engage
- build an awareness of, and appreciation for, traditional knowledge.

[37] Quote taken from consultations with the client.

Traditional knowledge can also – as demonstrated by large-scale proposals such as the savanna fire greenhouse gas offset projects – coexist with scientific knowledge, and provide important baseline information when scientific knowledge does not exist.

At present, recognition of traditional knowledge in the environmental impact assessment process in the Northern Territory operates at the level of policy, not law.

As an essential first step, it is necessary to formally recognise traditional knowledge under the new legislation, consistent with developments under international law and best practice.

For example, the United Nations (UN) Declaration on the Rights of Indigenous Peoples calls on states to obtain free, prior and informed consent of Aboriginal people through their representative institutions before adopting legislative or administrative measures that would affect them.[38] It provides an international framework of best practice for engagement.

The Biodiversity Convention 1992 also recognises the value of Indigenous traditional knowledge:

> Each contracting Party shall, as far as possible and as appropriate … subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.
>
> Each Contracting Party shall, as far as possible and as appropriate … protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.[39]

More recently, the United Nations Sustainable Development Goals (UNSDGs) has recognised the key contribution indigenous peoples can make to the achievement of those goals, particularly given their traditional knowledge and understanding of the environment and sustainable practices. Many of the 17 UNSDGs are relevant for indigenous peoples and have direct linkages to the human rights commitments outlined in the UN Declaration on the Rights of Indigenous Peoples.

At a federal level within Australia, many of the objects of the (CTH) *EPBC Act 1999* reflect a commitment to recognising and promoting traditional knowledge:

- to promote a co-operative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples
- to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity
- to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge

[38] Articles 19, 29 and 31.
[39] Articles 8(j) and 10(c).

- promotes a partnership approach to environmental protection and biodiversity conservation through recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity
- the involvement of the community in management planning.[40]

In a similar fashion, it is recommended that the objects of the new environmental assessment legislation include recognition of the role of Indigenous people in the conservation and ecologically sustainable use of natural and cultural resources.

Formal recognition is, of course, only an essential first step. The next step is to ensure Aboriginal traditional knowledge is fully incorporated and integrated into the new laws.

In this regard, recent developments in Canada are instructive and provide a model. At present, Canada provides a weak model for fully integrating traditional knowledge into the environmental assessment process, leaving the consideration of community knowledge and Aboriginal traditional knowledge as discretionary factors that can be taken into account in environmental assessment.[41]

However, a recent Expert Panel Report has recommended a different approach. It makes two key recommendations – namely, that assessment legislation:

- require that traditional knowledge be integrated into all phases of environmental assessment, in collaboration with, and with the permission and oversight of, Aboriginal groups
- confirm Aboriginal ownership of traditional knowledge and include provisions to protect Indigenous knowledge from and against its unauthorised use, disclosure or release.[42]

This report endorses these key recommendations as reflecting a best practice approach to the recognition and incorporation of traditional knowledge under legislation.

In terms of integrating traditional knowledge this should include an obligation on the proponent to consider how they engage with Aboriginal communities and Traditional Owners and that they:

- work with the community during planning and conducting its research
- seek the prior and informed consent of the community prior to acquisition of information
- collect traditional Aboriginal knowledge in collaboration with the community
- respect traditional Aboriginal knowledge and Aboriginal intellectual property rights, and
- bring traditional Aboriginal knowledge and scientific knowledge together.

[40] (CTH) *Environment Protection and Biodiversity Conservation Act 1999* ss 3(1)(d), (f) and (g).
[41] *Canadian Environmental Assessment Act 2012* s 19(3).
[42] See https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#_Toc022

Recommendations: Quality of information used in decision making processes

Recommendation 19: The preparation of a scorecard about the adequacy of environmental assessment *documents should be mandatory, rather than discretionary.*

Recommendation 20: The scorecard should be used at both draft and final stages of the EIS document.

Recommendation 21: Adequacy should include whether the environmental assessment is in plain English and meets accepted readability standards

Recommendation 22: There should be a requirement to consider whether a proponent is a fit and proper person, based on the NSW model, but also considering whether the person or entity had committed offences under the (NT) *Northern Territory Aboriginal Sacred Sites Act*.

Recommendation 23: There should be public disclosure of government decision making throughout the assessment and approval process including:

- referrals
- draft and final Terms of Reference
- draft and final EIS
- draft and final environmental assessment report
- final environmental approval only.

Recommendation 24: There should NOT be public or proponent disclosure of the draft environmental approval.

Recommendation 25: The environmental offence and penalty structure in the Northern Territory be reviewed and simplified with a view to setting a clear and consistent framework capable of delivering the public policy ends sought under a system of self-assessment.

Recommendation 26: The quantum for environmental offences and penalties in the Northern Territory be doubled to ensure deterrence.

Recommendation 27: There should be a flexible range of orders available to enforcement authorities and courts including requiring an offender:

- to publicise the offence
- undertake an environmental restoration project
- carry out an environmental audit
- attend a training course.

Recommendation 28: There should be penalty-for-profit provisions to deter non-referrals and other behaviours which could lead to harm to the environment.

Recommendation 29: The Department of Environment and Natural Resources establish a Steering Committee to explore the best model for the Northern Territory.

Recommendation 30: Climate change should be integrated into the assessment and approval process. This should include:

- scoping the proposal - ensuring potential greenhouse gas emissions are consistently and adequately scoped in project development
- developing standard environmental assessment requirements for greenhouse gas emissions
- project design – ensuring that predicted climatic events are accommodated and integrated
- preparing the environmental impact statement – assessing estimated greenhouse gas emissions and developing mitigation actions (avoid, minimise, manage, offset)
- evaluating the proposal impacts and merits against any Territory targets or aspirations
- determining the proposal – ensuring greenhouse gas emissions are part of the overall consideration by decision makers.

Recommendation 31: ESD should be integrated into the assessment and approval process. This should include as:

- an object to be achieved
- requiring decision makers to make decisions that further the objects of, and legislative targets under, legislation
- requiring decision makers to take ESD into account when assessing and approving projects
- requiring decision makers to ensure ecological integrity (maintain or improve environmental values) before approving developments under a strategic assessment approach

Recommendation 32: Guidelines on social impact assessment and improved valuation and pricing should be considered to assist in the quality of information and decision making.

Recommendation 33: The objects of the new environmental assessment legislation should include recognition of the role of Indigenous people in the conservation and ecologically sustainable use of natural and cultural resources.

Recommendation 34: There should be a requirement that traditional knowledge be integrated into all phases of environmental assessment, in collaboration with, and with the permission and oversight of, Aboriginal communities and Traditional Owners.

Recommendation 35: The legislation should confirm Aboriginal ownership of traditional knowledge and include provisions to protect Indigenous knowledge from and against its unauthorised use, disclosure or release.

Recommendation 36: The legislation should include an obligation on the proponent to consider how they engage with Aboriginal communities and Traditional Owners and that they:

- work with the community during planning and conducting its research
- seek the prior and informed consent of the community prior to acquisition of information
- collect traditional Aboriginal knowledge in collaboration with the community
- respect traditional Aboriginal knowledge and Aboriginal intellectual property rights
- bring traditional Aboriginal knowledge and scientific knowledge together.

Topic and theme

Encouraging public participation

The proposal

The proposal states that public participation will be allowed at each of the major decision points of the process, although this is qualified. Input will be sought on the referral, draft terms of reference, draft EIS, and supplement to the EIS, draft Environmental Assessment Report and draft Environmental Approval. For all stages except for the draft Environmental Assessment Report (where it is put as an option), it is proposed that this be public input.

The following information will be published:

- Statement of reasons for a decision on a referral
- Final terms of reference
- Supplement with additional information required to assess the project, including a summary of submissions and measures taken to address the issues raised
- Comments on the draft Environmental Assessment Report
- Environmental Assessment Report
- Statement of reasons for a decision to grant an Environmental Approval.

Other aspects of the proposal that seek to encourage public participation and decision-making are proposals to require:

- all environmental assessments to be supported by plain English summaries, and translated into local languages, as relevant
- the statement of reasons to be proportional to the complexity of the project
- the circumstances in which confidentiality can be claimed to be limited
- all referrals to be accompanied by a consultation report, to ensure more upfront community engagement (although this is only flagged as an option).

The analysis

Questions to consider:

Question 4: Should draft Environmental Assessment Reports be made available for review? Either to proponents or publicly? What value is there for either proponents or the public by making the draft reports available for review?

Question 5: Should upfront engagement with the community be legislated so that all referral documents are required to contain a consultation report as well as an ongoing stakeholder engagement plan?

Question 6: How can meaningful community engagement be achieved in the EIA process while keeping timeframes manageable?

Question 7: Should draft EIS documents that are provided to the NT EPA before publication (for adequacy review) include a consultation report (outlining the outcomes of engagement through the EIA process and how this has informed the draft EIS) as well as a proposed stakeholder engagement plan to illustrate how the public is to be engaged through the exhibition period? Should an EIS document fail its adequacy review if it does not provide evidence of ongoing engagement and community input into the project?

Community participation is crucial in ensuring the environmental decision making process is conducted in such a way as to obtain the best possible environmental outcomes in a legitimate and accountable manner. In many respects, best practice is based on common sense and respect. In a recent report asking community views on what is the best way for the government to consult the community?" one person responded:

> Slowly, honestly, professionally, genuinely. It must avoid tokenism in consultation. It needs to ensure that it is serious about and seen to be committed to genuine consultation.[43]

Likewise, the fact of consultation engenders trust:

> I don't understand why governments are so worried about public consultation. Public consultation is not the problem. It's avoiding it that's the problem. The more of it they do the less problems they'll have with the public[44]

Also, where possible, community consultation should also be done early in the life of the project. In their analysis of what works best in cities around the world, the Grattan Institute concluded:

[43] EDO NSW and TEC (2010) *Reconnecting the community with the planning system* at p 23.
[44] EDO NSW and TEC (2010) *Reconnecting the community with the planning system* at p 15.

> Early, genuine, sophisticated, sustained, and deep engagement was a recurring theme – particularly in cities that needed to make hard decisions and succeeded in doing so. Engagement seems to make tough decisions possible, and make them stick.[45]

By contrast, consultation which is not done early risks legitimacy and better, alternative approaches:

> projects move rapidly from 'something that could be done' to 'something that must be done' in order to solve some particular problem….Because the community is not involved in the process that defines the problem as soluble by a particular project or proposal, the consultation is necessarily limited.[46]

Community participation has long been recognised internationally as a fundamental part of environmental decision-making. Principle 10 of the Rio Declaration on Environment and Development 1992 (UN) states:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[47]

Since that time the Aarhus Convention (generally) and the Espoo Convention (on environmental impact assessment) have confirmed that community participation is central to good environmental decision-making.[48]

Likewise, in Australia community participation is a guiding Principle under the National Strategy on ESD in 1992 so that "decisions and actions should provide for broad community involvement on issues which affect them". It is a central notion in environmental and planning systems across Australia.

There have been many models devised to discern the elements and principles of community participation, with a view to understanding what works and what doesn't work. These models include Arnstein's Ladder of Citizen Participation to, more recently, the Public Participation Spectrum devised by the International Association for Public Participation Australasia (IAP2) (see

---

[45] Grattan Institute (2010) *Cities: Who Decides?* at: http://www.grattan.edu.au/programs/cities.php

[46] Sturup S (2016) "The Problem/Solution Nexus and its Effect on Public Consultation" in Leshinsky R (2016) *Instruments of Planning: Tensions and challenges for more equitable and sustainable cities* RTPI Library Series at pp 48-49

[47] See also Chapter 23 of Agenda 21:

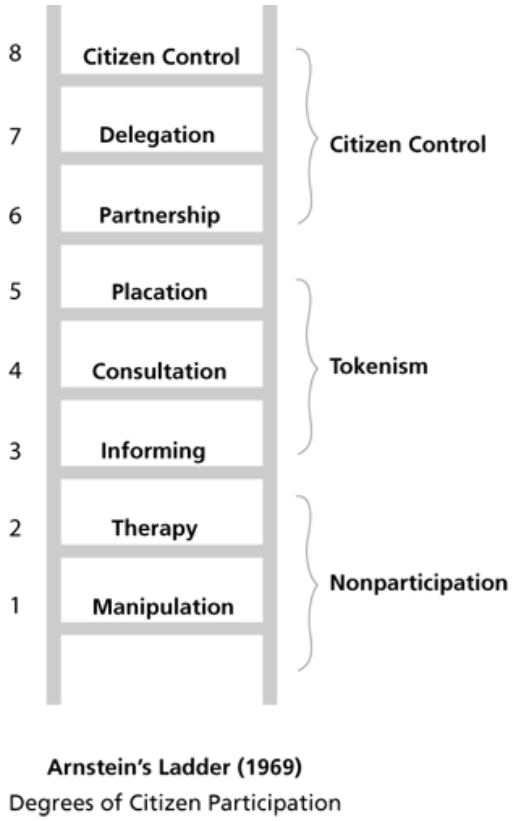
> One of the fundamental pre-requisites for the achievement of sustainable development is broad public participation in decision making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. Accordingly, individuals, groups and organizations need to know about and participate in environment and development decisions, particularly those which can affect their communities in which they live and work.

[48] See *UNECE Convention on Access to Information, Public participation in Decision-Making and access to Justice in Environmental Matters* (Aarhus, 1998) and the Convention on Environmental Impact Assessment in a Transboundary Context and its Kyiv Protocol (see the Preamble and Articles 1, 5, 6 and 8).

Figures 1 and 2 below). Caron and Gelber have also devised 10 Principles and procedures for making consultation work. These are:

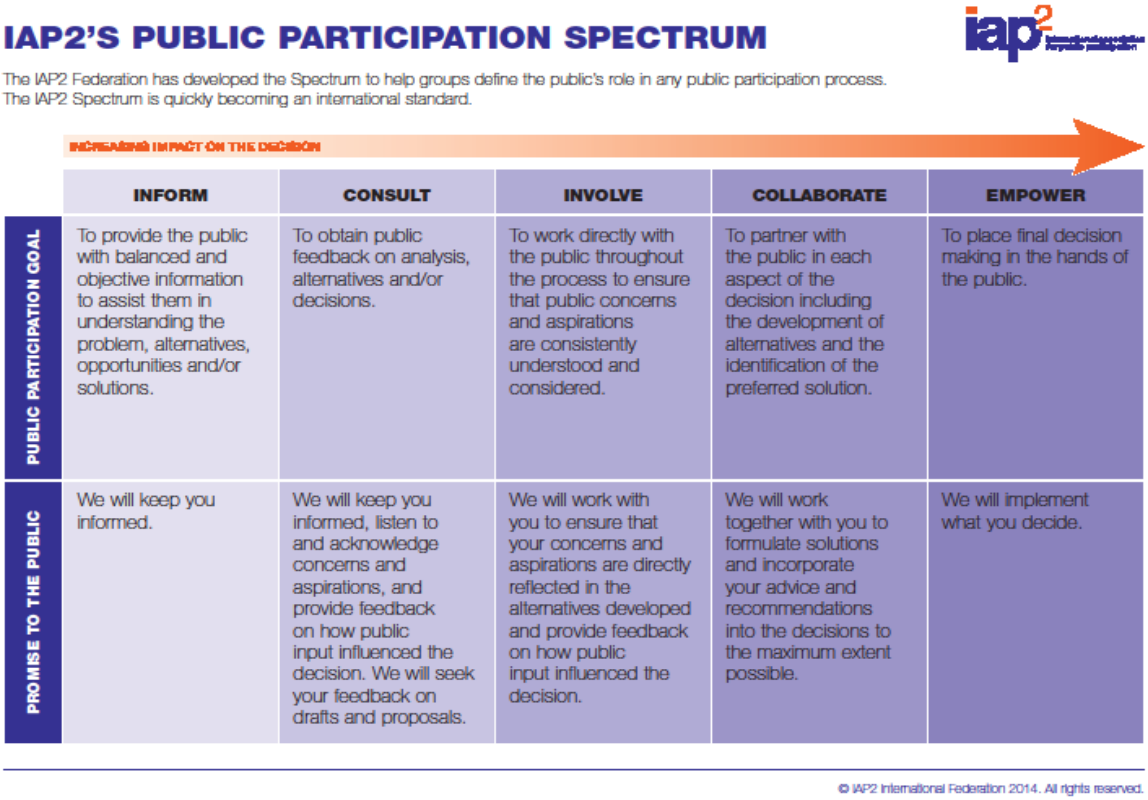
- Principle 1: Timing
- Principle 2: Inclusive
- Principle 3: Community-focused
- Principle 4: Interactive and deliberative
- Principle 5: Effective
- Principle 6: Faith in the process
- Principle 7: Well-facilitated
- Principle 8: Open, fair and subject to evaluation
- Principle 9: Cost effective
- Principle 10: Flexibility

Figure 1: Sherry Arnstein's ladder of Citizen Participation



Arnstein's Ladder (1969)
Degrees of Citizen Participation

Figure 2: Spectrum of Public Participation (IAP2)



IAP2'S PUBLIC PARTICIPATION SPECTRUM

The IAP2 Federation has developed the Spectrum to help groups define the public's role in any public participation process. The IAP2 Spectrum is quickly becoming an international standard.

INCREASING IMPACT ON THE DECISION →

	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision. We will seek your feedback on drafts and proposals.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will work together with you to formulate solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

While these models are useful in helping to understand specific community participation processes, it is submitted that there are three main ways in which genuine public participation adds significant value to environmental decision-making.

First, community participation helps to ensure that better decisions are made, as the views of all stakeholders are taken into account. Put simply, community involvement allows decision makers to acquire information about the public's preferences so they can play a part in the decisions about projects, policies or plans. This leads to improved decision-making because the knowledge of the public is incorporated into the calculus of the decision.

Second, community participation ensures the 'buy-in' of the community as people are more likely to accept decisions if they have been given a proper opportunity to be heard.

Thirdly, and related to the above, community participation helps to ensure fairness, justice and accountability. In terms of fairness, there are well known reasons why certain groups' needs and preferences can go unrecognised through normal government processes. Such needs may only come onto the radar once an open public participation process occurs. This is particularly the case for environmental interests. Public participation is also consistent with accountability in governance.

Consultation on draft Environmental Assessment Reports

As noted above, there should be public disclosure of government decision-making throughout the assessment and approval process including:

- referrals
- draft and final Terms of Reference
- draft and final EIS
- draft and final environmental assessment report
- final environmental approval only.

The exception is that there should NOT be public or proponent disclosure of the draft environmental approval.

At these points, public disclosure should contemplate input from the community, not simply inform them of the decision.

In terms of environmental assessment documents such as the Environmental Assessment Report, community participation helps to ensure that better decisions are made, as the views, input and expertise of all stakeholders are taken into account. It also ensures that decisions and approvals are more legitimate, which in turn ensure fairness, justice and accountability.

Upfront engagement: the need for consultation reports and engagement plans

Upfront engagement is best practice. However, if it is not legislated some proponents may seek to cut corners, and government may not properly hold them to account for this. In NSW, a prerequisite to obtaining an Aboriginal Heritage Impact Permit (AHIP) is that the person needs to complete an Aboriginal community consultation process that meets legislatively prescribed standards.[49]

This system serves to ensure that a proponent has both engaged with communities and, usually, shaped their project in light of the consultations.

This approach could provide a model for environmental assessment reforms in the Northern Territory.

In other words, proponents should be required to complete consultation reports and engagement plans prior to referrals and to lodge them with EIS documents. Failure to complete consultation reports and engagement plans adequately (that is, in accordance with guidelines) should be part of the adequacy review conducted by NT EPA. Where Aboriginal consultation is required, Land Councils should have a concurrence role in determining the adequacy of the consultation report and engagement plan.

[49] See (NSW) *National Parks and Wildlife Regulation* 2009 cll 80C and 80D.

Balancing meaningful community engagement with manageable timeframes

Unnecessary delays in the environmental assessment and approval system are a concern from both a community and proponent point of view, undermining its legitimacy. The reforms should seek to improve the assessment process in order to reduce delays and increase certainty for developers and the community.

This does not mean, however, that fundamental checks and balances should be removed. Genuine public participation and robust environmental assessment are all essential components of a workable and legitimate planning system that the community can trust. As the Northern Land Council has noted:

> It is self-evident that if parties with particular interests (like Aboriginal landowners) start with limited prior exposure to ideas and issues, then meaningful consultation will take longer. It follows that if government and industry are really interested in properly informed consent but short timeframes they will cooperate to provide exposure outside the individual EIA process.[50]

Community participation forms the cornerstone of the planning system. Planning is about people and communities and their environment, so it is essential that they have a genuine say in the future development of their areas. Further, the planning system is only workable if the community has confidence in it. Fast-tracking approvals is more likely to result in more problems further down the track, with poor quality decision making, unsustainable projects, and entrenched community opposition to projects.

Engaging with Aboriginal communities

There are several overlapping principles and elements which can help to ensure that engagement and consultation with Aboriginal communities is meaningful and constructive. These principles and elements need to be integrated into the environmental assessment and approval process under both guidelines and legislation.

First, proponents and government agencies need to be flexible and make bona fide efforts to understand the cultural, social and political character of the communities they are engaging with, as well as to ensure cultural appropriateness of consultation practices. This includes, for example, holding on-country consultations and a recognition of the difference between Traditional Owners and the community for the purposes of engagement. As the Northern Land Council has noted:

> The way Aboriginal community consultation is done is more important than legislating at what point in the process it is done.[51]

Second, there also needs to be a recognition of Aboriginal processes, rather than expecting Aboriginal people to travel and abide by bureaucratic timeframes. As one Aboriginal representative has stated:

[50] Quote taken from consultations with the client.
[51] Quote taken from consultations with the client.

> They tend to have meetings where people have to travel either by bus or car and generally rural or remote areas get left out.[52]

Third, dedicated resources need to be made available to ensure that participation is meaningful. For example, guidelines for the Alcan Gove Alumina Refinery required that the Executive Summary be presented in Yolngu Matha, given the large number of people in this community who used English as a second language.

Fourth, appropriate resourcing can help to ensure that engagement processes build the capacities of Indigenous communities to engage in future processes.

Fifth, Indigenous diversity needs to be recognised and accommodated with targetted models, protocols, mechanisms and strategies used in different locations and places, as required. This can help to ensure that planning is at the scale of each Indigenous groups' traditional country.

Sixth, proponents (and government agencies) should identify key Aboriginal communities and Traditional Owners early on in the environmental assessment process (beyond general community engagement). As suggested above, there should be an obligation to prepare a consultation report and engagement plan prior to submitting a referral. This report and plan should set out how Aboriginal communities and Traditional Owners were consulted, the results of that consultation (the report) and how the relationship is going to proceed (the plan). There are examples of good stakeholder engagement in the Northern Territory and elsewhere. For example, Ranger uranium mine and its engagement strategies with bodies such as the Northern Land Council. These best practices needs to be identified and made part of the regulatory approach.

Seventh, timeframes must be realistic, flexible and culturally sensitive. As the Northern Land Council has stated:

> Compulsory upfront consultation for all referrals could be burdensome for Aboriginal communities.[53]

A range of circumstances can also exacerbate these difficulties – for example, multiple projects, sorry business, ceremonial cycles, weather and remoteness. In order to deal with this issue, a range of approaches could be tried. Timeframes should be staggered for different projects, depending on their size and significance. This is a common approach in other jurisdictions. However, in addition, two possible alternatives could be adopted. On the one hand, the NT EPA could be given the flexibility to extend timeframes based on the consideration of factors such as size, significance, cultural practices, weather and remoteness. On the other hand, the NT EPA could make an upfront determination of the appropriate timeframe for particular projects, based on the referral documents, consultation report and an assessment of such factors.

Eighth, and relatedly, NT EPA should have the power to "stop the clock" where consultation is not done properly or where important information is presented or uncovered during the assessment process. As the Northern Land Council has suggested, such an approach would help to address an endemic problem:

[52] EDO NSW and TEC (2010) Reconnecting the community with the planning system at p 21.
[53] Quote taken from consultations with the client.

Under the current system, crucial data is often not released until late in the process, and there is not sufficient time for it to be adequately reviewed, let alone communicated to indigenous stakeholders.[54]

[54] Quote taken from consultations with the client.

Recommendations: Encouraging public participation

Recommendation 37: There should be public consultation throughout the assessment and approval process including:

- referrals
- draft and final Terms of Reference
- draft and final EIS
- draft and final environmental assessment report
- final environmental approval only.

Recommendation 38: There should NOT be public or proponent consultation on the draft environmental approval.

Recommendation 39: Proponents should be required – under legislation - to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter.

Recommendation 40: A key element of the consultation report and engagement plan needs to involve engaging with Aboriginal communities.

Recommendation 41: Engagement with Aboriginal communities needs to be done in accordance with established guidelines that include guidance on matters such as:

- 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
- resources provided to facilitate engagement.

Recommendation 42: Failure to complete consultation reports and engagement plans adequately (for example, in accordance with the guidelines) should be part of the adequacy review conducted by NT EPA.

Recommendation 43: Land Councils should have a concurrence role in the adequacy review conducted by NT EPA., specifically determining the adequacy of the consultation report and engagement plan where Aboriginal consultation is required.

Recommendation 44: Timeframes should be staggered – according to legislative requirements - for different projects, depending on their size and significance.

Recommendation 45: NT EPA should have the discretion to extend timeframes based on the consideration of factors such as size, significance, cultural practices, weather and remoteness.

Recommendation 46 (in the alternative): NT EPA could make an upfront determination of the appropriate timeframe for particular projects, based on the referral documents, consultation report and an assessment of such factors.

Recommendation 47: NT EPA should have the power to 'stop the clock' where the consultation report is assessed as inadequate and/or important information is presented or uncovered during the assessment process.

Topic and theme

Improving environmental outcomes and accountability

The proposal

The proposal states that there are a number of mechanisms that will help ensure good environmental outcomes and accountability. These include:

- the use of TEOs coupled with a schedule of development types that will require an environmental assessment and approval
- the community being able to comment and participate in all stages of decision making
- the need for an environmental approval, and this being directly informed by an environmental assessment process
- the Minister being responsible for issuing an environmental approval
- the need to provide reasons, including the need to provide and table a public statement of reasons if the approval does not reflect the conclusions and advice provided by the NT EPA
- the power of the NT EPA to reject a referral if the information is inadequate
- offence provisions for providing false or misleading information.

The analysis

The proposal puts forward a number of mechanisms to help ensure good environmental outcomes and accountability. Many of these have been discussed elsewhere in this report.

This section briefly deals with the following: the Minister issuing the environmental approval, statement of reasons and false and misleading information.

Minister issues environmental approval

It is appropriate that the Minister issues an environmental approval. The NT EPA should provide publicly available advice but the Minister should make the decision and be accountable for it.

Statement of reasons

The need to give reasons provides many potential benefits including:

- improving the quality of primary decision-making, through encouraging decision-makers to reflect more carefully on their task and facilitating quality assurance processes

- ensuring due process and enabling those affected by a decision to understand why a decision was made
- assisting applicants in their consideration of whether to exercise rights of review or appeal
- assisting tribunals and courts in providing merits and judicial review
- promoting public confidence in the administrative process by disclosing the reasoning process of decision-makers to the public
- providing the wider public, and government agencies, with examples of how the law is applied in particular fact situations.[55]

It is recommended that the need to give reasons follows that under federal legislation to include a:

> statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.[56]

False and misleading information

Under the *NT EPA Act*, it is an offence to give information or a document to the NT EPA which a person knows is false or misleading. The maximum penalty is 200 penalty units or $26,000.[57]

In NSW, it is an offence to provide information in connection with a planning matter – including in an EIS - that the person knows, or ought reasonably to know, is false or misleading.[58] The maximum penalty for this offence is $1m for corporations and $250,000 for individuals. A similar offence exists under federal environmental laws, with penalties of 2 years gaol and/or $21,600 for individuals and $108,000 for corporations when done knowingly and half that when done recklessly.[59]

The negligent or reckless provision of information should also be an offence (attracting a lesser penalty because of the differential state of mind).

[55] Martin, Wayne (1999) "The Decision-Maker's Obligation to Provide a Statement of Reasons, Fact and Evidence: The Law" (1999) 51 Admin Review 19.
56 (CTH) *Administrative Decisions (Judicial Review) Act 1977* s 13(1).
[57] (NT) *Northern Territory Environment Protection Authority Act* s 31.
[58] (NSW) *Environmental Planning and Assessment Act 1979* s 148B.
[59] (CTH) *Environment Protection and Biodiversity Conservation Act 1999* s 489.

Recommendations: Improving environmental outcomes and accountability

Recommendation 48: The Minister issues all environmental approvals, based on publicly available advice from NT EPA.

Recommendation 49: The requirement to give reasons should include a statement in writing setting out:

- the findings on material questions of fact
- referring to the evidence or other material on which those findings were based
- giving the reasons for the decision.

Recommendation 50: It should be an offence to provide information in the assessment and approval process which is false and misleading, either knowingly, recklessly or negligently.

Recommendation 51: Significant penalties should attach to this offence, which can be graded depending on intention.

Topic and theme

Making the best use of our community's eyes and ears

The proposal

The proposal canvasses a number of options to improve the provision of information to the Minister and NT EPA about development in remote areas.

The first option considers empowering various groups to make referrals:

- Land Councils and government agencies (through formal authorisation), or
- particular environment and industry groups, or
- affected stakeholders, or
- any member of the public.

Under all these options, the referral would be public and the NT EPA would be required to provide a formal response to the referral that also becomes public.

A second option is to continue the existing informal process of encouraging members of the community to report suspected incidents, like under the Pollution Hotline.

A third option is to allow third parties and/or affected stakeholders to seek injunctions where unapproved works are proceeding or works are there is a suspected or anticipated breach of an environmental approval.

The analysis

Questions to consider:

Question 8: Do you support any of the options outlined? Please provide information to explain why an option is supported.

Question 9: If you do not support third-party referrals, please provide information to support this position. Are there other mechanisms to address the issue of regulating consistently and fairly across the whole of the Territory?

Question 10: Should the legislation include provisions that allow for third-party injunctions and if so, how broadly should these be applied (that is, to the public or to defined groups?). Please outline the concerns you have if you do not support third-party injunctions.

Consistent with this topic and theme - making the best use of our community's eyes and ears – there is clear value in allowing any person to refer. This is the approach taken in Western Australia and there is no evidence to suggest the need for an alternative approach.[60]

It is appropriate that the referral would be public and the NT EPA would be required to provide a formal response to the referral that also becomes public.

In order to ensure that referrals did not unnecessarily exhaust the resources of NT EPA, it is suggested that three checks are appropriate. First, the referral process would need to have some formality, such as a short form with guidelines around what is required. Second, NT EPA would be able to dismiss a referral where it is made without foundation. Third, the requirement for the proponent to undertake a consultation report and engagement plan would discourage frivolous referrals.

In the alternative, it is suggested that a combination of organisations and entities be empowered to refer matters – namely: Land Councils, government agencies, particular environment and industry groups. This could be done through formal authorisation. It is always appropriate for affected stakeholders to be able to refer matters.

Injunctions

There are four main circumstances where an injunction might be sought:

- to protect a private right
- to enforce a private statutory right
- to protect a public right, such as by a public nuisance
- to enforce a public right or restrain a public wrong.

In the field of environmental and planning law, interim or interlocutory injunctions play an important role in seeking to remedy or restrain breaches of planning or environmental statutes.

For interim or interlocutory injunctions, the principles are the same. The applicant must show that:

- there is a serious question to be tried, and
- the balance of convenience favours the grant of an injunction.

In terms of the former, the Court needs to determine whether there is a serious question to be tried that the defendant is breaching or threatens to breach the statute concerned.

In terms of the latter, the Court needs to consider whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.[61]

In considering this issue, the Court will look at a range of factors which may or may not be relevant to the particular case. These include:

[60] (WA) *Environment Protection Act 1986* s 38(4).
[61] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623.

a. whether the plaintiff will suffer irreparable injury for which damages are not an adequate remedy if the injunction is not granted
b. whether an undertaking as to damages is offered by the plaintiff
c. where the status quo lies
d. the nature of the interlocutory relief sought, whether prohibitory or mandatory
e. the relative strength of each party's case
f. any equitable considerations relevant to the type of injunction sought
g. any prejudice to third parties
h. any prejudice to the public interest
i. the time period before the final hearing.

As the Chief Judge of the NSW Land and Environment Court has noted, these factors take on different significance in planning and environmental cases.[62]

In seeking to deal with the balance of convenience, the Courts may also exercise its discretion as to whether and how broadly an injunction may be granted.[63]

Taken together, these factors serve as an important check on third party rights while still ensuring that the protection of the environment is a matter that is a concern of all Territorians.

[62] Preston B (2012) "Injunctions in planning and environmental cases" Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) Bunker Bay, Western Australia, 30 August 2012.
[63] Smith N 92014) "Interlocutory Injunctions – A guide" at p 16.

Recommendations: Making the best use of our community's eyes and ears

Recommendation 52: Any person may refer a proposal to the EPA for assessment if it thinks it may have a significant impact on the environment.

Recommendation 53: Referrals should be made as soon as practicable.

Recommendation 54: Referrals are to be made public.

Recommendation 55: Referrals would need to comply with simple guidelines.

Recommendation 56: Consultation reports and engagement plans should be lodged when referring a matter.

Recommendation 57: A formal public response to the referral would usually be required (by NT EPA).

Recommendation 58: In exceptional circumstances, NT EPA would be able to dismiss a referral through declaring it a referral without foundation.

Recommendation 59: A referral would operate to "stop the clock", meaning other approvals would need to wait for a referral decision.

Recommendation 60: NT EPA and/or the Minister would also have a "call in" power.

Recommendation 61 (in the alternative): A combination of organisations and entities be empowered to refer matters – namely:

- Land Councils, Prescribed Bodies Corporate, government agencies, particular environment and industry groups (through formal authorisation)
- affected stakeholders (as of right).

Topic and theme

Introducing review processes

The proposal

The proposal canvasses four options as to who hears reviews/appeals:

1. All decisions are subject to merits review by NT CAT
2. All decisions are subject to judicial review by the court
3. All assessment decisions (made by the NT EPA) are reviewable by NT CAT and all approval decisions (made by the Minister) are reviewable by the court
4. All assessment decisions (made by the NT EPA) are reviewable by the Court and all approval decisions (made by the Minister) are reviewable for NT CAT.

The proposal does not put forward options as to what decisions should be reviewable, Rather, the Discussion Paper asks what decisions made in the assessment, approval and monitoring system should be reviewable.

It is proposed to grant third party appeal rights to the following groups:

- proponents
- affected stakeholders (such as neighbours or peopled downstream from a development)
- particular environment and industry groups
- Land Council and local governments
- a person who made a Substantive submission throughout the referral process.

The Discussion Paper also asks how to avoid or minimise frivolous and vexatious applications.

The analysis

Questions to consider:

Question 11: How can this proposal be improved to strike the appropriate balance between providing business certainty and ensuring accountability in decision making? What groups or entities should be included or not included?

Question 12: Do you have any suggestions for how we can ensure frivolous and vexatious applications are minimised or avoided?

Question 13: Which decisions made in the assessment, approval and monitoring system should be reviewable?

Questions to consider cont'd:

Question 14: Should a statement or recommendation made in an assessment report be subject to review?

Question 15: Which option (1, 2, 3 or 4) is best for the Territory? Please provide information to explain your position.

Question 16: What alternative option do you suggest we consider?

Question 17: Might your position change depending on who is given responsibility for decisions in the assessment and approval processes? i.e. Might your position change if the NT EPA was not responsible for decisions in the assessment system?

This section addresses the four fundamental elements of the proposal noted above – namely:

- reviewable matters
- third party review rights
- appellate or review bodies
- frivolous and vexatious applications.

Reviewable matters

The Discussion Paper asks what decisions should be reviewable and, additionally, whether a statement or recommendation made in an assessment report should be reviewable.

In determining whether a decision should be subject to review, consideration needs to be given to the principles of natural justice including the right to be heard, procedural fairness, and the right to have the matter determined by an unbiased decision-maker.

On this basis, only decisions should be reviewable. Statements or recommendations (either in the assessment report or elsewhere) should not be reviewable. Statements or recommendations may, of course, underpin a decision and provide an evidential basis for a challenge, such as a statement of reasons.

For the same reasons, reviewable decisions should be limited to the following:

- whether a proposed activity or amendment should have been referred (an assessment decision)
- if so, the assessment method required (an assessment decision)
- a decision whether to approve a proposed activity or amendment, including any conditions proposed (an approval decision)

Third party review rights

Review rights derive from administrative law, whose fundamental tenets have developed over time. These tenets require that administrative decisions are underpinned by:

- legality (judicial review and merits)
- fairness (judicial review and merits)
- participation (merits)
- accountability (merits)
- consistency (merits)
- rationality (judicial review and merits)
- proportionality (judicial review and merits)
- impartiality (judicial review and merits).

The usual aim of merits review is to provide the review applicant with a correct or preferable administrative decision, while at the same time, improving quality and consistency in relation to the making of decisions of that kind.

The primary aim of judicial review in the court is to ensure the legal correctness of administrative decisions. It seeks to prevent unlawful decisions from remaining or standing on the public record.

Notwithstanding these differing aims, the two notions overlap – the distinction "does not involve a bright line test. The boundary is porous and ill defined".[64]

a) Merits review

Merits review involves the re-exercise of the administrative power previously exercised by an original decision-maker such as a council or Minister. The Tribunal – in the Northern Territory, the Northern Territory Civil and Administrative Tribunal (NTCAT) – becomes the new decision-maker, having the same powers and functions as the original decision-maker. The Tribunal can uphold the original decision, or overturn the decision and make a fresh one.

As Preston and Smith have identified, the attributes of merits review include the following:

- enhancing the quality of the reasons for decisions
- providing a forum for full and open consideration of issues of major importance
- increasing the accountability of decision makers
- clarifying the meaning of legislation
- ensuring adherence to legislative principles and objects by administrative decision makers
- focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments
- highlighting problems that should be addressed by law reform.

These attributes boil down to three key benefits – improving the consistency, accountability and quality of decision-making. These will be briefly discussed.

64 Spigelman JJ (2004) "The integrity branch of Government" 78 ALJ 724 at 732; see also Cane P (2000) "Merits Review and Judicial Review – The AAT as Trojan Horse" 28 Federal LR 213 at 220.

i. improving the consistency of decision-making

Comprehensive and centralised jurisdiction has been identified as one of 12 characteristics of successful environmental courts and tribunals. As the Chief Judge of the Land and Environment Court has noted:

> More successful ECTs [environmental courts and tribunals] … have the authority to hear, determine and dispose of many different types of cases … by enabling all of these types of cases to be centralised in a 'one-stop shop', the quality, consistency and speed of decision-making can all be enhanced.[65]

In this way, the hearing of all merits review matters under the (NT) *Environmental Assessment Act* (and other environmental legislation) by NTCAT would contribute to consistency of decision-making.

ii. improving the accountability of decision-making

Merits review promotes accountability in decision-making. First, merits review provides an additional layer of scrutiny, which improves and sustains community confidence in the decision-making process. Second, it can be a check against power. In NSW, the Independent Commission Against Corruption has consistently recommended to the NSW Government that third party merits appeal rights should be extended to major and controversial developments (amongst others) to improve transparency and accountability of development approval processes.[66] ICAC noted:

> Merit-based reviews can provide a safeguard against the corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities.[67]

iii. improving the quality of decision-making

The quality of decision-making can be improved through:

- the development of an environmental jurisprudence
- providing scrutiny and facilitating good outcomes
- fostering natural justice and fairness.

---

[65] Preston BJ (2014) "Characteristics of Successful Environmental Courts and Tribunals" (paper delivered at the 27th LAWASIA Conference, Bangkok, Thailand, 3 - 6 October 2014, published in 26 *Journal of Environmental Law* 365.
[66] 39 See Independent Commission Against Corruption (2007) *Corruption Risks in NSW Development Processes* at: http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/1280-corruption-risks-in-nsw-development-approval-processes-position-paper/file
[67] Independent Commission Against Corruption (2007) *Corruption Risks in NSW Development Processes* at p 19.

As a former judge of the NSW Land and Environment Court has stated:

> Decisions on ecologically sustainable development (ESD) by the Land and Environment Court … mostly have been in its merit review jurisdiction. It is because the Court has an unusual merits review jurisdiction that it has been able to deliver a significant number of judgments on ESD in which, standing in the shoes of the administrative decision-maker, it has determined the dispute on the merits.[68]

Furthermore, and crucially, the very prospect of merits review works to ensure that decisions in the first instance are based on clear and transparent reasoning, and are undertaken with a high degree of care and balance. This helps to ensure that they provide scrutiny and facilitate good outcomes. A decision-maker that is aware that its decisions can be subject to merits review is more likely to carefully weigh considerations to ensure that the most appropriate decision is made, than one that knows its determination cannot be challenged. The potential for merits appeals, as much as the taking of them, can be expected to enhance the rigour of decision-making. Moreover, the merits review process ensures that large-scale projects are given appropriate levels of scrutiny, as befits their potential for significant adverse impacts and attendant levels of community concern. Also, merits review provides an opportunity for fulsome public participation in large-scale projects across NSW. This is important in itself but also acts as a key check and balance in the system. As the Independent Commission Against Corruption (ICAC) has noted:

> Community participation … act[s] as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision.[69]

Finally, merits review fosters natural justice and fairness. As has been noted:

> The rationale for merits review is founded in the notion of natural justice. The rights, liberties and obligations of citizens should not be unduly dependent upon administrative decisions which are not subject to review on the merits. Prima facie, an administrative decision should be reviewable on the merits if it is likely to affect the interests of a person. Interests can be commercial, property and legal interests as well as intellectual, and like interests (e.g. environmental interests or concerns within the objects of an organisation). Interests can also include legitimate expectations.[70]

---

[68] See Biscoe P (2007) "Ecologically Sustainable Development in NSW", paper delivered at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007 at pp 27-28.

[69] Independent Commission Against Corruption (2012) *Anti-Corruption Safeguards and the NSW Planning System* at p 19: http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012/file

[70] Preston B and Smith J (1999) "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW at 107.

b) Judicial review

Judicial review of administrative decisions is to ensure that powers are exercised for the purpose for which they are conferred and in the manner in which they are intended to be exercised. Judicial review is limited to considering whether a decision was lawfully made. Grounds include jurisdictional error, error of law, improper exercise of power, failing to take relevant considerations into account, taking irrelevant considerations into account, improper purpose, bad faith, vagueness, inflexible application of policy, improper procedures, or denial of natural justice (not giving a fair hearing or being biased).

In determining a judicial review matter, the Court will examine the statement of reasons for decision and the material that was before the original decision-maker. If an error of law is found or due process has not been followed, the options available to the Court are generally limited to setting aside the decision and referring the matter back to the decision-maker for reconsideration according to law.

The grounds of judicial review are well-established under the common law. However, there is clear value in following the federal approach and codifying the grounds under which judicial review can be sought.[71]

c) Standing

The proposal does not differentiate between standing for merits review and standing for judicial review. In this regard, it seems to be based on the Productivity Commission Report which recommends:

Standing to bring merit and judicial review applications should be given to:

- the project proponent
- persons and organisations whose interests have been, are or could potentially be directly affected by the project
- those who have taken a substantial interest in the assessment process.[72]

While there is obvious value and simplicity in this approach, a slightly different approach that differentiates between standing for merits review and standing for judicial review and enforcement is recommended, based on the experience and practice in NSW over the past forty years.

i. Standing for merits review

Consistent with the proposal in the Discussion Paper, this report recommends standing for merits review to the following:

- proponents
- affected stakeholders (such as neighbours or peopled downstream from a development)
- particular environment and industry groups
- Land Councils and local governments
- Prescribed Bodies Corporate
- a person who made a substantive submission throughout the referral process.

[71] (CTH) *Administrative Decisions (Judicial Review) Act 1977* s 5.
[72] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 20.

Proponents and affected stakeholders would have private rights, and hence standing, at common law. The other entities derive their standing from a public interest perspective, including those who participated in the democratic process of making a submission. As the Productivity Commission has argued:

> A number of organisations have supported participation in the assessment process as grounds for standing ('objector standing'), including the World Bank (2006). The Commission considers there are benefits in granting standing to those who made a submission to the consultation process. It encourages individuals and interest groups to raise their issues in a submission to the decision maker, which helps prevent issues being brought before a review body that the original decision maker did not have a chance to consider (Brown, Stern and Tenenbaum 2006). Further, it also recognises that there are representative organisations that might have a legitimate interest in the major project DAA process that may not be granted standing at common law (for example, species protection groups).[73]

In addition, standing should also be extended to others in limited circumstances, such as where it is in the public interest or the interests of justice to do so.[74]

ii. Standing for judicial review and enforcement

By contrast, there is no reason in theory or practice 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. Moreover, The Australian Law Reform Commission has previously concluded that "there is an important role for private plaintiffs in public interest litigation".[75] This conclusion was, in turn, based on its observation that neither the Attorney General – traditionally, the sole guardian of the public interest – nor government agencies could be entrusted with the enforcement of public rights due to a "range of political, financial and bureaucratic factors".[76]

The underlying rationale is that environmental laws routinely include developments likely to have a significant impact on communities, the environment, and shared natural resources such as water and agricultural land. As ANEDO has noted:

> Accordingly, the public has a strong interest in ensuring – where necessary – that decision-makers have adhered to the relevant statutory framework, and proponents have properly implemented the conditions attached to their development approval. Indeed, as the State may lack the necessary resources to ensure compliance, open standing provisions provide genuine public interest litigants with the opportunity to enforce environmental laws and conditions of consent on behalf of the community.

---

[73] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at pp 274-5.
[74] See (NSW) *Land and Environment Court Act 1979* s 39A; Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at pp 20 and 35.
[75] Australian Law Reform Commission (1996) Beyond the door-keeper*:* Standing to sue for public remedies at 4.15: see http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html
[76] 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

There is also no evidence to suggest that open standing provisions result in a multitude of litigants inundating the courts with frivolous or vexatious appeals – the so-called 'floodgates' argument.[77] Open standing also has the significant advantage of shifting analysis – and costs - to the substantive matter, rather than on whether the community or environmental group is entitled to be in the Court.[78]

By contrast, the Productivity Commission has provided support for broad standing – rather than open – standing provisions, as it allows the legality of the process to be enforced, providing an important 'safety valve' in the system.[79] There are strong public policy grounds for having broad standing provisions:

- there is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures – this is the role of judicial review
- the potential for additional scrutiny promotes better decision-making, accountability and public confidence that the law will be upheld. It is also instructive to note that where third party rights do exist, they are very rarely exercised
- broad standing means that neighbours and only those directly affected don't bear the entire burden of protecting the environment.

Put another way, all Australians are entitled to expect the law should be followed and to have confidence in sound decision-making. A raft of recent reviews have also supported a broad view of standing, including the:

- Independent Review of the (CTH) *EPBC Act 1999* (2009)
- NSW Independent Commission Against Corruption (2012)
- Administrative Review Council (2012)
- Productivity Commission (2013).

The (CTH) EPBC Act 1999 provides a good model in this regard, giving standing to 'interested persons' to bring legal proceedings challenging a decision made under the Act:

- an individual who lives in Australia and who has been engaged in environmental protection during the previous two years
- an organisation or association whose objects and purposes include environmental protection and which has been actively engaged in environmental protection during the previous 2 years.

In a similar vein, the following people can apply to the Federal Court for an injunction to enforce the (CTH) EPBC Act 1999:

- the Environment Minister
- an individual whose interests are affected, or who has been engaged in activities to protect the environment during the previous two years

[77] 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.
[78] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 272.
[79] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 20.

- an organisation (incorporated in Australia) whose interests are affected, or which, during the previous 2 years, has had the protection of the environment as one of its objects and purposes and which has been engaged in environmental protection.

Some organisations – almost always industry groups - have expressed concerns over broad standing provisions, although there is little evidence to support the view there is a problem.80 As noted below, there are both a range of mechanisms to deal with vexatious proceedings, and a lack of evidence to suggest the need to go beyond these approaches.

Appellate or review bodies

As noted above, the dichotomy between merits review and judicial review often seems to overlap. However, as the Chief Judge of the NSW Land and Environment Court has said:

> Yet, the legitimacy of judicial review depends on courts policing that boundary, ensuring that judicial interference with administrative decisions and conduct only occurs in respect of the legality and not the merits of such decisions and conduct.[81]

This line is most appropriately drawn through clearly delineating merits review and judicial review functions according to expertise and roles.

On this basis, it is appropriate that the Northern Territory Civil and Administrative Tribunal (NTCAT) deal with merits review and the Supreme Court deal with judicial review.

Frivolous and vexatious applications

As the Productivity Commission has noted, vexatious applications are difficult to define "although objections which have little basis in planning regulations would likely be included". Essentially, they are matters without legal foundation or a proper cause of action. As the Legal Information Institute states vexatious litigation is:

> Legal proceedings started with malice and without good cause. Vexatious litigation is meant to bother, embarrass, or cause legal expenses to the defendant. A plaintiff who starts such litigation either knows or should reasonably know that no legal basis for the lawsuit exists.

[80] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 273.
[81] Preston B J (2006) "Judicial review of illegality and irrationality of administrative decisions in Australia" 28 *Australian Bar Review* 17 at 17-18.

Under Northern Territory legislation, vexatious proceedings are defined as including:

a. a proceeding that is an abuse of the process of a court or tribunal
b. a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose
c. a proceeding instituted or pursued without reasonable ground
d. a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

Vexatious proceedings have no place under the rule of law and the proper administration of justice. However, there is little evidence of its use, notwithstanding the clamour from lobby and industry groups.[82] Likewise, care needs to be taken in applying the term, as it can often be used as a way of marginalising and silencing opposition to a development. For example, in the Adani case before the Federal Court in 2015, the proceedings were described as lawfare and vigilante litigation despite the Minister conceding he had made and error and the Federal Court setting aside the approval.[83]

Also, as noted in the Productivity Commission Report:

> Proponents are quick to dismiss any court action taken against their projects as 'vexatious' and advocate for 'certainty' to be entirely one way in its flow: towards approval of controversial mining projects. And yet, communities need certainty as well. … mining proponents consider any decision against their interests as a temporary but outrageous infringement on their freedom, and considerably overstate the impacts of community-initiated court actions, out of all proportion to the overall costs of their projects. (Lock the Gate Alliance, sub. DR97, pp. 14–15)

In any case, there are a range of mechanisms that can be used to minimise and avoid frivolous and vexatious proceedings.

In this regard, it is important to emphasise that the Courts have existing powers and procedures to identify and prevent vexatious litigation, to strike out frivolous or vexatious pleadings and to declare people as vexatious litigants. This includes under the Supreme Court Rules, and the (NT) *Vexatious Proceedings Act*. Under the Supreme Court Rules, the Court has the power to give judgment, stay proceedings or strike out pleadings – for example:

Order 23 Summary stay or dismissal of claim and striking out pleading

23.01 Stay or judgment in proceeding

1. Where a proceeding generally or a claim in a proceeding:
    a. does not disclose a cause of action;
    b. is scandalous, frivolous or vexatious; or
    c. is an abuse of the process of the Court,

[82] Nothing under the (CTH) *Environment Protection and Biodiversity Conservation Act 1999* in 17 years.
[83] *Mackay Conservation Group v Commonwealth of Australia and Adani Mining*.

the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

2. Where the defence to a claim in a proceeding:

    a. does not disclose an answer;
    b. is scandalous, frivolous or vexatious; or
    c. is an abuse of the process of the Court,

    the Court may give judgment in the proceeding generally or in relation to the claim.

23.02 Striking out pleading

Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading:

a. does not disclose a cause of action or defence;
a. is scandalous, frivolous or vexatious;
b. may prejudice, embarrass or delay the fair trial of the proceeding; or
c. is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the endorsement or pleading be struck out or amended.

Furthermore, the Court any make a vexatious proceeding order against the person and a range of people can make application for such an order, including:

- the Attorney-General;
- the Solicitor-General;
- a Registrar of the Court;
- anyone against whom, in the Court's opinion, the person has instituted or conducted vexatious proceedings;
- anyone who, in the Court's opinion, has a sufficient interest in the matter.

The effect of such an order is to place the person on a register and to limit their ability to take proceedings in the jurisdiction. Courts may also award costs against litigants who are seeking only to delay or use the Court as an abuse of process.[84]

Finally, early engagement with communities – as envisaged in the Discussion paper – is likely to improve the quality of decision-making as well as increase the legitimacy and buy in of the development.

For these and related reasons the Productivity Commission concluded:

> it does not appear that the existing protections against vexatious litigation need to be strengthened.

[84] Productivity Commission (2011c) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Research Report, Canberra. PC 2011C as noted in Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 277.

Costs

Justice Toohey has famously said:

> There is little point in opening the doors to the Courts if people cannot afford to come in.

In this respect, there is a need to complement formal and substantive changes to access to justice – such as broadened standing – with procedural reforms that also facilitate access to justice, particularly where public interest litigation is concerned. These include changes to the normal rules around costs, undertakings for damages, and security for costs.

Recommendations: Introducing review processes

Recommendation 62: The following assessment decisions should be reviewable:

- whether a proposed activity should have been referred
- whether a proposed amendment should have been referred
- if so, the assessment method required.

Recommendation 63: The following approval decisions should be reviewable:

- whether to approve a proposed activity, including any conditions proposed
- whether to approve a proposed amendment, including any conditions imposed.

Recommendation 64: the ground under which judicial review can be sought should be established under legislation, in line with the federal approach.

Recommendation 65: The following people and groups should have standing for merits review:

- proponents
- affected stakeholders (such as neighbours or peopled downstream from a development)
- particular environment and industry groups
- Land Councils and local governments
- Prescribed Bodies Corporate
- a person who made a legitimate submission throughout the referral process.

Recommendation 66: Any person should be able to bring proceedings to remedy or restrain a breach of an environmental law, or to stop harm to the environment.

Recommendation 67 (in the alternative): As with merits review, the following people and groups should have standing for judicial review and enforcement:

- proponents
- affected stakeholders (such as neighbours or peopled downstream from a development)
- particular environment and industry groups
- Land Councils and local governments
- Prescribed Bodies Corporate
- a person who made a legitimate submission throughout the referral process.

Recommendation 68: Standing should also be extended to others in limited circumstances, such as where it is in the public interest or the interests of justice to do so.

Recommendation 69: The Northern Territory Civil and Administrative Tribunal (NTCAT) should deal with merits review.

Recommendation 70: The Supreme Court should deal with judicial review matters.

Recommendation 71: The existing protections against vexatious litigants and proceedings be maintained.

Recommendation 72: Where public interest litigation is undertaken, access to justice should be facilitated through procedural reforms including changes in the following areas - the normal rules on costs, undertakings for damages and security for costs.

Topic and theme

Roles and responsibilities

The proposal

The proposal states that measures and guidelines will be adopted to improve clarity over roles and responsibilities.

The proposal also considers the role of the NT EPA as either based on its current responsibilities as assessor, advisor and regulator (and expanding as the reforms take hold) or some combination of these roles.

The analysis

Questions to consider:

Question 18: What combination of responsibilities should the NT EPA be given? Please provide information to explain why an option is supported. What improvements to the environmental management system will be achieved as a result of the NT EPA having these responsibilities?

Question 19: If you consider the NT EPA should not retain any of its existing responsibilities, who should be tasked with those responsibilities as the alternative?

The Hawke II review identified a number of concerns with the existing process including:

- uncertainty
- capacity constraints
- inconsistency and inequity
- lack of transparency
- ambiguity
- sectoral capture
- compliance.

These concerns are echoed by a range of stakeholders, from EDO NT to the Minerals Council of Australia (NT Division). The general consensus is that there is an urgent need for reform. As EIANZ has stated:

> There is little faith in the NT's current environmental assessment and approvals processes. Developers argue that there is no consistency and certainty of process, the process is too long and administration heavy; the community argues that the processes are applied inconsistently and there is little transparency in the approvals process or in implementation of approval conditions.

confidence that the regulatory system will ensure development in the NT is safe and subject to appropriate independent oversight.

An independent regulator is a key means of resolving many of the problems identified in Hawke Review II. The OECD has previously recommended that an independent regulator is most appropriate when:

- there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions
- both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required, or
- the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality.

Based on an analysis of submissions relating to the reform process in the Northern territory over the past seven years, there seems to be broad support for an independent regulator as well as NT EPA taking on advise, assessment and regulatory functions. For example, of the 12 submissions received on Hawke Review II, only the industry submissions do not support an independent NT EPA.

The independence of NT EPA is enshrined in legislation. Under section 9 of the (NT) *Environment Protection Act 1970*:

1. The NT EPA is not subject to the direction or control of the Minister in the exercise of its powers or the performance of its functions.

2. A member is not subject to the direction or control of the Minister in the exercise of the member's powers or the performance of the member's functions.

Likewise, a member of the Board may not be in the public service and staff who are seconded from the public service to NT EPA are subject only to the direction of the Chair of NT EPA.[85]

Only Western Australia adopts a similar approach.[86] While all other jurisdictions except Queensland have established an EPA under statute, they are either subject to the Minister's direction (such as in Tasmania) or have partial independence, such as in the exercise of enforcement actions (NSW, SA and the ACT).[87]

Likewise, the functions exercised by NT EPA stand out when compared to other jurisdictions around Australia. As the following table shows, it is only in the Northern Territory and Western Australia that the EPA has advisory, assessment and regulatory functions.

[85] (NT) *NT EPA Act* ss 10(2)(a) and 37(2).
[86] (WA) *Environmental Protection Act 1986* s 8.
[87] See, for example (NSW) *Protection of the Environment Administration Act 1991* s 13.

Table 3: Functions exercised by EPAs across Australia

	Functions		
	Advisor	**Assessor**	**Regulator**
ACT	✗	✗	✓
NSW	✗	✗	✓
NT	✓	✓	✓
QLD	*NA*	*NA*	*NA*
SA	✓	✗	✓
TAS	✗	✓	✓
VIC	✗	✗	✓
WA	✓	✓	✓

Independence and breadth of functions is an alluring combination and potential sweet spot from the point of view of protecting the environment. The only (not insignificant) qualification arises in relation to resourcing. In this respect, it is worth reiterating Bates' observation that there is a need for "a strong, well-resourced and professionally competent bureaucracy to evaluate the report to ensure that the statement prepared is balanced, honest and reasonable". [88]

These concerns are amplified when NT EPA is undertaking advisory, assessment and regulatory functions. It is therefore crucial that NT EPA is properly resourced to undertake its full range of functions. In the last Annual Report, it is noticeable that no prosecutions were undertaken, with a heavy emphasis on directions from authorised officers and penalty infringement notices.[89] This seems incongruous in light of the widespread concerns about the operation of environmental laws in the Northern Territory.

The move to a user pays model – such as higher application and licensing fees - can assist in terms of resourcing. Likewise, an experienced environmental counsel could be retained to provide consistent advice on regulatory and enforcement functions where necessary, extracting both good value and strategic value from resources spent. It is also preferable, where resources are limited, to have an independent body rather than a government agency exercising functions (and those avoiding perceptions of bias and regulatory capture).

It is also important that the membership of NT EPA enables it to properly acquit their responsibilities. At present, to sit on the Board, the Administrator must be satisfied that the person has skills, knowledge and experience in one or more of the following areas:

- environmental science
- environmental and natural resource management
- waste management and pollution control
- economic analysis
- social analysis

[88] Bates (2016) *Environmental Law in Australia* at p 464.
[89] NT EPA (2016) *Annual Report 2015-16* at p 30.

- business
- environmental law
- management in a regulatory field.

Furthermore, the Administrator must ensure a balance of skills and may – within their discretion - have regard to the person's skills, knowledge or experience relating to one or more of the following:

- regional areas and issues
- indigenous issues
- working with the community.

Two related observations can be made. First, skills, knowledge and experience regarding Indigenous traditional knowledge is not one of the areas where expertise is sought, although it is an area which the Discussion Paper identifies as important and is seeking input on. Rather, skills, knowledge or experience relating to indigenous issues is only a discretionary consideration for membership of the Board.

This approach does not properly value Indigenous traditional knowledge, nor in any sense reflect the high proportion of the NT population who are Aboriginal or Torres Strait Islander.

To redress this, there should be direct Aboriginal membership of NT EPA, as well as an Indigenous Advisory Committee established under legislation to advise on the operation of the new reforms, including programs, policies and strategies. These structures should be established in close consultation with Aboriginal communities.

Recommendations: Roles and responsibilities

Recommendation 73: NT EPA - an independent regulator established under statute – should be retained.

Recommendation 74: NT EPA should exercise advisory, assessment and regulatory functions.

Recommendation 75: Enhanced funding should be made available to NT EPA to enable it to exercise its advisory, assessment and regulatory functions.

Recommendation 76: NT EPA should explore user pays models to undertake its functions.

Recommendation 77: NT EPA should explore engaging an experienced environmental counsel to provide advice on regulatory and enforcement functions.

Recommendation 78: NT EPA should ensure that membership of its Board values Indigenous traditional knowledge and participation by ensuring direct Aboriginal representation on this basis.

Recommendation 79: NT EPA should establish an Indigenous Advisory Committee under legislation to advise on the operation of the new reforms.

Recommendation 80: Changes to the NT EPA governance structure should be undertaken in close consultation with Aboriginal communities.

Topic and theme

Introducing environmental offsets

The proposal

The proposal states that reforms will support the 'avoid, mitigate, offset' hierarchy, allowing proponents to provide environmental offsets as part of the project approval process.

Specific consultation will take place in relation to developing and implementing an offset policy (and guidelines) in the Northern Territory once the legislation is in force.

The analysis

Environmental offsets or green offsets are of relatively recent origin, first being used in Australia around 15 years ago. Environmental offsets are mechanisms used to compensate for an environmental impact. There use and legitimacy in relation to airsheds, waterways and soil has become increasingly commonplace; most notably in relation to climate change and carbon with emissions trading schemes.

Environmental offsets are also increasingly used for biodiversity conservation, although there use in this context can be problematic and contested. The principal objection to the use of offsets in relation to biodiversity is its intrinsic value.

Biodiversity offsets have also been shown to be problematic in practice. A recent study examined the effectiveness of 208 offsets applied in Western Australia, finding that at most 39% of offsets were effective and 30% were not or inadequately implemented.[90]

Various attempts have been made to develop offset principles for biodiversity. For example, Fallding has argued:

1. Biodiversity offsets will be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts
2. Offsets must be based on sound ecological studies and principles
3. Offsetting must achieve benefits in perpetuity
4. Offsets must be based on principles of 'net gain'
5. Offset arrangements must be enforceable.

[90] May J, Hobbs RJ and Valentine LE (2017) "Are offsets effective? An evaluation of recent environmental offsets in Western Australia" *Biological Conservation* volume 26 at pp 249-257.

To this list, ANEDO has added the following three principles:

1. Legislation and policy should set clear limits on the use of offsets
   Indirect offsets must be strictly limited.
2. Offsets must be additional.

The situation in NSW is typical. On the one hand, the environmental agency in NSW – the Office of Environment and Heritage – has developed a set of principles for the use of biodiversity offsets in NSW. These detailed principles are as follows:

1. Impacts must be avoided first by using prevention and mitigation measures
2. All regulatory requirements must be met
3. Offsets must never reward ongoing poor performance
4. Offsets will complement other government programs
5. Offsets must be underpinned by sound ecological principles
6. Offsets should aim to result in a net improvement in biodiversity over time
7. Offsets must be enduring – they must offset the impact of the development for the period that the impact occurs
8. Offsets should be agreed prior to the impact occurring
9. Offsets must be quantifiable – the impacts and benefits must be reliably estimated
10. Offsets must be targeted
11. Offsets must be located appropriately
12. Offsets must be supplementary
13. Offsets and their actions must be enforceable through development consent conditions, licence conditions, conservation agreements or contracts.

On the other hand, sitting alongside this is the approach to biodiversity offsets where major projects are involved in NSW. These principles are as follows:

- Principle 1: Before offsets are considered, impacts must first be avoided and unavoidable impacts minimised through mitigation measures. Only then should offsets be considered for the remaining impacts
- Principle 2: Offset requirements should be based on a reliable and transparent assessment of losses and gains
- Principle 3: Offsets must be targeted to the biodiversity values being lost or to higher conservation priorities
- Principle 4: Offsets must be additional to other legal requirements
- Principle 5: Offsets must be enduring, enforceable and auditable
- Principle 6: Supplementary measures can be used in lieu of offsets.

The models shown here traverse the spectrum of being based on ecological principles (Fallding, ANEDO and, to a lesser extent, OEH) to being about based on a development imperative and ensuring projects take place (the NSW Biodiversity Offsets Policy for Major Projects).

Provided that ecological issues can be properly addressed, offsets can deliver social benefits and are an important option for Aboriginal people. For example, the savanna fire greenhouse gas offset projects have realised significant social and ecological benefits while local offsets can provide opportunities for ranger groups, and support Indigenous employment.[91]

In this regard, the introduction of an offsets policy is not dependent on the passage of the new reforms. Rather, consultation could begin immediately. In this regard, it is crucial that communities in the Northern Territory engage on the issue of offsets at the earliest possible stage so that a scheme is developed that properly addresses the complex set of ecological and social considerations. For example, any reputable and workable scheme needs to give clear guidance around the principles above, such as the application of the 'avoid, minimise, mitigate' framework and what is caught by the scheme. Also, to address equity issues, offsets should be applied locally and within the bioregion of the project where possible.

It is also important that consultation is ongoing and governance structures are established to deal with any new policy on offsets. For example, an independent Steering Committee could be established to oversee and provide advice on the operation of the scheme, including offsets for large projects.

[91] See, Russell-Smith J, PJ Whitehead & PM Cooke *(Eds.)* (2009) *Culture, ecology and economy of fire management in northern Australia: rekindling the wurrk tradition, CSIRO Publishing, Melbourne*.

Recommendations: Introducing environmental offsets

Recommendation 81: The Department of Environment and Natural Resources should immediately begin community consultation on environmental offsets before a Discussion Paper is prepared.

Recommendation 82: These consultations should form the basis of a Discussion Paper on offsets, including principles and mechanisms to give clear guidance on the scope and application of the scheme and to address ecological, social and equity considerations.

Recommendation 83: Consultation should be ongoing, including the establishment of an independent Steering Committee with oversight and advisory functions.

Annexure A: Recommendations of the Roadmap for a Modern Environmental Regulatory Framework for the Northern Territory: NT EPA

Recommendation 1: Government should adopt a framework for a single, whole-of-government environmental approval issued by the Minister for the Environment on the basis of an environmental impact assessment by the NT EPA.

Recommendation 2: The Environmental Assessment Act should be revised and updated to give effect to Recommendation 1.

Recommendation 3: The revised Environmental Assessment Act should allow the NT EPA to conduct strategic environmental assessments and provide strategic environmental advice.

Recommendation 4: The Waste Management and Pollution Control Act should be revised and updated to provide for the NT EPA to issue all licences and approvals to discharge or emit wastes to land, water, sea or air environments.

Recommendation 5: The Environmental Assessment Act and the Waste Management and Pollution Control Act should be revised and updated as described above. In addition, some other waste management and pollution control legislation should be consolidated into a new Environmental Protection Act to be administered by the NT EPA.

Recommendation 6: The NT EPA responsibilities should continue to involve conducting environmental impact assessments for proposals that may have a significant impact on the environment, the regulation of activities that may have significant impacts or risks to the environment, and the provision of strategic advice on matters of environmental importance.

Recommendation 7: The NT EPA should be an independent authority comprising a board of experts appointed on the basis of their experience, knowledge and ability to meet the objectives and responsibilities of the NT EPA.

Annexure B: 83 Fit and proper persons

(1) This section has effect in determining whether a person is a fit and proper person … but does not limit the generality of those sections.

(2) The appropriate regulatory authority may take into consideration any or all of the following:

(a) that the person has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation,

(b) that, if the person is a body corporate, a director of the body corporate:

(i) has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation, or

(ii) is or has been the director of another body corporate that has contravened any of the environment protection legislation or other relevant legislation, or has held a licence or other authority that has been suspended or revoked under any of the environment protection legislation or other relevant legislation,

(c) the person's record of compliance with the environment protection legislation,

(d) if the person is a body corporate, the record of compliance with the environment protection legislation of any director or other person concerned in the management of the body corporate,

(e) whether, in the opinion of the appropriate regulatory authority, the management of the activities or works that are or are to be authorised, required or regulated under the relevant licence are not or will not be in the hands of a technically competent person,

(f) whether, in the opinion of the appropriate regulatory authority, the person is of good repute, having regard to character, honesty and integrity,

(g) if the person is a body corporate, whether, in the opinion of the appropriate regulatory authority, a director or other person concerned in the management of the body corporate is of good repute, having regard to character, honesty and integrity,

(h) whether the person, in the previous 10 years, has been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,

(i) if the person is a body corporate, whether a director or other person concerned in the management of the body corporate has, in the previous 10 years, been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,

(j) whether the person, during the previous 3 years, was an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit,

(k) if the person is an individual, whether he or she is or was a director or person concerned in the management of a body corporate that is the subject of a winding up order or for which a controller or administrator has been appointed during the previous 3 years,

(l) if the person is a body corporate, whether the body corporate is the subject of a winding up order or has had a controller or administrator appointed during the previous 3 years,

(m) whether the person has demonstrated to the EPA the financial capacity to comply with the person's obligations under the licence or the proposed licence,

(n) whether the person is in partnership, in connection with activities that are subject to a licence or licence application, with a person whom the appropriate regulatory authority does not consider to be a fit and proper person under this section,

(o) any other ground prescribed by the regulations.

(3) A reference in subsection (2) to a director of a body corporate extends to a person involved in the management of the affairs of the body corporate.

(4) Without limiting the generality of the above, the appropriate regulatory authority may disregard contraventions referred to in subsection (2) having regard to the seriousness of the contraventions, the length of time since they occurred, and other matters that appear relevant to the appropriate regulatory authority.

Bibliography

Australian Law Reform Commission (1985) Standing in public interest litigation AGPS Canberra (ALRC 27)

Australian Law Reform Commission (1996) Beyond the door-keeper*:* standing to sue for public remedies AGPS Canberra (ALRC 78)

ANEDO (2009) Submission on Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice

ANEDO (2011) Submission to the Administrative Review Council on Judicial Review in Australia – Consultation Paper

ANEDO (2013) Submission to the Productivity Commission on Access to Justice Arrangements

ANEDO (2013) Submission on Productivity Commission Draft Report – Major Project Development Assessment Processes

ANEDO (2014) House of Representatives inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals

Biscoe P, "Ecologically Sustainable Development in NSW" (paper delivered at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007)

Department of the Environment (2013) Matters of National Environmental Significance Significant Impact Guidelines 1.1, Environment Protection and Biodiversity Conservation Act 1999

EDO NSW and TEC (2010) Reconnecting the community with the planning system

EDO NSW (2012) *Submission to the NSW Law Reform Commission concerning costs in public interest litigation*

EDO NSW (2016) Submission on the EIA Improvement Project – Environmental impact assessment for major projects

EDO NT (2016) Response to the draft advice of the NT EPA about recommended reforms for the Territory's environment legislation

EDOs of Australia (2015) *Submission on EPBC Amendment (Standing) Bill 2015*

Fallding, Martin (2014) "Biodiversity offsets: Practice and promise" 31 Environment and Planning Law Journal 11.

Government of Canada Expert Panel report (2017) *Building Common Ground: a New Vision for Impact Assessment in Canada* at:

https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html

Hawke A (2015) Review of the Northern Territory Environmental Assessment and Approval Processes

Hunt J (2013) Engaging with Indigenous Australia - exploring the conditions for effective relationships with Aboriginal and Torres Strait Islander communities Closing the Gap Clearing House at: http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2013/ctgc-rs23.pdf

Independent Commission Against Corruption (2012) *Anti-Corruption Safeguards and the NSW Planning System* at: http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012/file

Independent Commission Against Corruption (2007) Corruption Risks in NSW Development
Processes at:http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/1280-corruption-risks-in-nsw-development-approval-processes-position-paper/file

Leshinsky R (2016) *Instruments of Planning: Tensions and challenges for more equitable and sustainable cities* RTPI Library Series.

Martin, Wayne (1999) "The Decision-Maker's Obligation to Provide a Statement of Reasons, Fact and Evidence: The Law" (1999) 51 Admin Review 19

May J, Hobbs RJ and Valentine LE (2017) Are offsets effective? An evaluation of recent environmental offsets in Western Australia Biological Conservation V 26 at pp 249-257.

Northern Territory Civil and Administrative Tribunal Rules

NT EPA (2009) The Environment Protection Authority's Final Advice on Improving Environmental Assessment in the Northern Territory

NT EPA (2016) Draft Advice Regarding Dr Allan Hawke's Review of the Northern Territory's Environmental Assessment and Approval Processes

NT EPA (2017) Roadmap for a modern environmental regulatory framework for the Northern Territory

OECD (2014) The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing.

Preston B and Smith J (1999) "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999,* Conference Proceedings, Nature Conservation Council of NSW

Preston B (2008) “The role of courts in relation to adaptation to climate change”, a paper presented to: Adapting To Climate Change Law And Policy Conference organised by ANU Centre for Climate Law & Policy and Griffith University Socio-Legal Research Centre ANU College of Law ANU, Canberra, 19-20 June 2008

Preston B (2012) “Injunctions in planning and environmental cases” Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) Bunker Bay, Western Australia, 30 August 2012

Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report

Robinson M (2012) “The Legal Framework of Challenges to Administrative Decision Making in NSW - A NSW Administrative Law Refresher”, a paper delivered to a Learned Friends conference held at Lord Howe Island on 1 April 2012

Smith J (2016) Merits Review in Planning in NSW at: http://www.edonsw.org.au/merits_review_in_planning_in_nsw

Smith N (2014) Interlocutory Injunctions – a guide