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To Whom it May Concern,

SUBMISSION: DRAFT ENVIRONMENT PROTECTION BILL AND REGULATIONS

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I welcome the opportunity to make a submission on the Northern Territory Government's (NTG's) draft *Environment Protection Bill* and *Environment Protection Regulations*.

I have been a resident of the Northern Territory (Territory) since 2005, where I have worked as a property, land rights, native title and environmental lawyer. I am currently undertaking a PhD at Sydney University which looks at the intersection between development, Indigenous land rights and the environment in the Territory. I am employed from time to time as a sessional lecturer at Charles Darwin University (teaching environmental and planning law, and energy and resources law). I am currently a Board member of the Environmental Defenders Office (NT), where I was Chair between 2014 and 2017. I provide this submission in a personal capacity, drawing on the above experience.

General comments

I congratulate the NTG on the preparation of the draft *Environment Protection Bill* and *Environment Protection Regulations* (Draft Bill and Draft Regulations). The existing regulatory framework governing environmental assessment and protection in the Northern Territory is widely acknowledged to be completely inadequate, and many decades out of date. It has led to rapidly declining public confidence in the NTG's ability to assess, regulate and manage development activities. If implemented, the Draft Bill and Draft Regulations will transform environmental assessment, approval and management in the Northern Territory and bring it more closely into line with other jurisdictions in Australia.

In particular, I welcome the following components of the Draft Bill and Draft Regulations:

(a) a stand-alone environmental approval from the Minister for the Environment, which should go some way to alleviate validly held concerns in the community regarding regulatory capture, conflicts of interest and corruption in the Northern Territory (arising in part from the existing sectoral approvals process);

(b) the explicit integration of the principles of Ecologically Sustainable Development (ESD) in environmental decision-making under the Draft Bill and Draft Regulations;
(c) a decision-making hierarchy to assist decision-makers under the Draft Bill and Draft Regulations;
(d) an enforceable "general environmental duty" to avoid environmental harm;
(e) strong tools for protecting the environment, including an ability to declare protected environmental areas, to create environment protection plans and to prohibit certain actions, the introduction of an environmental levy and environmental bonds;
(f) stronger enforcement and compliance powers.

However, there are a number of key components of the Draft Bill and Draft Regulations which require amendment, clarification or removal. Of particular concern is the lack of substantive criteria to guide the NT EPA and the public regarding key decisions in the environmental assessment process, and the regulatory enshrinement of poor and selective consultation practices that undermine public participation and transparency. It is also vitally important that the NTG reinsert third party appeal rights (both for judicial review and for merits appeal) in the interests of transparency, public participation, access to justice and to restore the NTG's "social licence to regulate".

I raise the following concerns and/or recommendations.

1. **The Draft Bill and Draft Regulations should require consultation with and involvement of Northern Territory Land Councils at all stages of environmental assessment, regulation and protection**

Over 50% of the Northern Territory is Aboriginal land owned under the *Aboriginal Land Rights (Northern Territory) Act* 1976. Much of the remainder of land in the Northern Territory is subject to native title (exclusively, or coexisting with other interests). There is no integration of Northern Territory Land Councils, Native Title Representative Bodies, Native Title Bodies Corporate, or Registered Native Title Parties (Aboriginal Land Holders) within the environmental decision-making framework set out under the Draft Bill and Draft Regulations. It is critical that these bodies are informed and consulted at all stages of environmental assessment, regulation and protection where proposed actions involve land subject to Indigenous interests. The Draft Bill and Draft Regulations should be amended to effect this, following appropriate consultation with Northern Territory Land Councils.

2. **More clearly articulate the principles of ESD and their relationship to decision-making under the Draft Bill and Draft Regulations**

Consideration of, and application of, the principles of ESD is the central pivot around which government environmental decision-making should revolve, and has been foundational to environmental regulation globally since the Rio Declaration in 1992.

While it has been incorporated to some extent in the Draft Bill and Regulations, application of the principles of ESD should be strengthened and clarified.

Section 14(2) requires a decision-maker to consider the principles of ESD in making a decision under the Draft Bill. This should be amended so that a decision-maker should consider and apply the principles of ESD. This is consistent with the objectives of the Draft Bill and best practice environmental regulation.

There is no overarching definition of ESD in the Draft Bill and Draft Regulations to guide decision-makers, proponents or the public. Section 14 should be amended to include an overarching definition of what ESD is. Examples include:

- "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased" (Australia's *National Strategy for Ecologically Sustainable Development* (1992)).
- "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" (s 4 *Commissioner for Environmental Sustainability Act 2003 (Vic))*.

Section 14(3) states that a decision-maker is not required to specify how the decision-maker has considered the principles of ESD. This exemption is unacceptable and will lead to continued poor decision-making, poor transparency and a lack of accountability. Decision makers should be required to specify how they have considered and applied the principles of ESD.

The listed principles of ESD in sections 16 to 21 are not consistent with other formulations of ESD. There is no reason to depart from globally and domestically understood and applied principles of ESD. There is significant Australian policy and jurisprudence about the meaning of ESD that could and should be applied in a Northern Territory context. It will be far easier for policy makers, decision-makers, proponents, and the public to interpret and apply the principles of ESD if they are consistent with other definitions. I would recommend using the principles of ESD listed in section 3A of the *EPBC Act*.

To ensure application of the principles of ESD, a general duty should be imposed by legislation upon the Minister, and on any person on whom a function is imposed or a power is conferred under the Draft Bill to perform the function or exercise the power in such a manner as to further the objects of the Draft Bill and Draft Regulations.

3. **More clearly define "significant environmental impact" and its relationship to decision-making under the Draft Bill and Draft Regulations**

"Significant impact" is a key threshold concept that underpins a number of key components of the Draft Bill and Draft Regulations. For example, pursuant to s63 of the Draft Bill a proponent must refer to the NT EPA for assessment a proposed action that has the potential to have a significant impact on the environment. Further, it is an offence pursuant to s48 to carry out an action which has a significant environmental impact

without authorisation. However, the definition of "impact" (in s9 of the Draft Bill) and "significant impact" (in s10 of the Draft Bill) is unclear, not linked to the "environment" and would be difficult for a decision-maker to apply or for the public (or a referring proponent) to understand. It is vitally important that this central definition be amended for clarity. I note that section 124A of the *Planning and Development Act* 2007 (ACT) provides a clearer definition of significant adverse environmental impact. Australian jurisprudence on the meaning of "significant environmental impact" may also be of assistance in clarifying this definition. See further point 4(b) for more concerns regarding the significant impact test and its integration within the proposed environmental assessment regime.

4. **Declaration of objectives and triggers**

The concept of environmental triggers is central for activation of the environmental assessment process, however, there is no information about what these triggers will be. Draft environmental objectives and triggers should be released for public consultation as a matter of urgency, and before enactment/promulgation of these reforms.

5. **Lack of substantive criteria regarding environmental assessment processes and lack of integration between Draft Bill and Draft Regulations**

The current NT *Environmental Assessment Administrative Procedures* are characterized by a lack of substantive and objective criteria to establish in what circumstances environmental assessment will be required, the level or method of environmental assessment, and what environmental assessment documentation must contain.

While the proposed Draft Bill and Draft Regulations are more detailed and prescriptive, to a large extent they fall into the same trap and fail to adequately set out substantive and objective criteria to guide decision-makers applying the environmental assessment process (and give the public confidence in the process). Instead, they predominantly set out timeframes for different components of the environmental assessment process.

I note the following issues with the provisions governing environmental assessment under the Draft Bill and Draft Regulations:

a) The Regulations contain the bulk of the processes for environmental impact assessment. This level of prescription should be removed from the Regulations and inserted in the Draft Bill. Regulations can be amended without parliamentary or public scrutiny and it is important that any amendments to this process be subject to transparent parliamentary and democratic processes.

b) There is a disconnect between the Draft Act and the Draft Regulations regarding the "significant impact" threshold and its relationship to the requirement for environmental assessment to occur.

Section 59(1)(b) of the Draft Bill states that the purpose of environmental impact assessment is, inter alia, to ensure that all actions that may have a significant impact on the environment are assessed, planned and conducted taking into account… [lists factors]. Section 63(c) of the Draft Bill requires a proponent to refer a proposed action that has the potential to have a significant impact on the environment.

However, the Regulations do not clearly link the significant impact test to the requirement for environmental assessment. For example, Regulation 22(2) states that the NT EPA may refuse to accept an EIS referral if it considers that an environment impact assessment is not required for the proposed action. Similarly, Regulation 28 permits the NT EPA (after a referral is accepted) to decide that an environmental impact assessment is not required. No basis is given for such a decision to be appropriate. The Draft Regulations also prescribe a highly unusual process that undermines public transparency in the process and creates significant uncertainty about when environmental assessment is required. For example, the rationale for requiring the NT EPA to consult further with the proponent and relevant statutory authorities (but not with the public) about whether environmental assessment is required is unclear and suspect.

In accordance with best practice environmental regulation and section 59(1)(b) of the Draft Bill, <u>all</u> proposed actions that in the NT EPA's view may have a significant impact on the environment should undergo environmental assessment. The only circumstances in which the NT EPA should consider that an EIA is not required is if it is satisfied that the action will not have a significant impact on the environment.

c) To improve transparency and accountability, there should be a public register of referrals made under the Draft Bill and Draft Regulations (see *Environmental Protection Act* 1986 (WA) and EPBC Act 1999 s 74(3)), and a public register of decisions to accept/refuse a referral together with a statement of reasons.
d) "Strategic assessments" are not defined anywhere in the Draft Bill or Draft Regulations, nor are clear and objective criteria set out for when they would be appropriate. There are no criteria listed for accepting or refusing a strategic assessment referral (regulation 21).
e) Pursuant to section 64 of the Draft Bill, only proponents can refer actions for strategic assessment. It is unlikely that a proponent would seek to have a project strategically assessed (including for assessment of cumulative impacts). Other persons should be able to refer matters for strategic assessment, such as adjacent or downstream landowners, environmental organisations, Aboriginal Land Councils, native title representative bodies, registered native title claimants, and pastoralists.
f) Section 66 of the Draft Bill gives a statutory decision-maker discretion to refuse to consider an application if the decision-maker considers that the action should have been referred to the statutory decision-maker. This should be mandatory (ie a statutory decision-maker must refuse to consider the application).

g) Regulation 5 lists the methods of environmental impact assessment, but these terms are not defined, nor are clear and objective criteria set out for when these different methods of environmental assessment would be appropriate in the Regulations. Part 5 Division 3, 4 and 5, where you would expect this detail to be fleshed out, are silent on the criteria for when these differing methods of assessment should apply. Assessment by referral contains no provision for public participation and thus undermines a key object of the legislation. There is no detail about what a "supplementary environmental report" is. There is no guidance about when an assessment by Inquiry would be appropriate.
h) There is some guidance given in Regulation 84 about the content of an environmental impact statement. However, these requirements lack detail and are posed as alternatives. At a minimum, a proponent should be required to show how the proposed action incorporates and applies the principles of ESD.
i) Regulation 100 provides a process for the requirement for a supplement to be waived (at the instigation of the proponent). This should be removed. A supplement requiring a component to take into account public submissions is a core component of public participation and transparency.
j) Regulation 117(2) is highly problematic (see too Regulation 166, and Regulation 174), and provides that the NT EPA may give a copy of the draft assessment report, draft environmental approval or draft statement of unacceptable impact to the proponent and invite submissions from the proponent. There is no reason for the proponent to have an opportunity to influence these documents – this enshrines poor (and potentially corrupt) regulatory practice, undermines transparency of the process, and calls into question the independence of the environmental assessment process.
k) Part 7 sets out a process for the variation of proposed actions. Specifically, Regulations 143, 163(2), 172(2) give the NT EPA power to make a decision about the process to be followed if a proposal is varied at different stages in the environmental assessment process. These regulations state, inter alia, that the NT EPA must consider the variation and determine whether the environmental impacts of the variation are such that further environmental assessment is required. However, there are no transparent or objective criteria for the NT EPA to make such a determination.

6. **Require consideration of climate change**

While consideration of climate change impacts is a component of ESD, there should be stand-alone provisions requiring consideration of climate change impacts in environmental assessments. The Draft Bill and Regulations should require assessment of the likely greenhouse gas emissions of all major projects. This should include a requirement that environmental impact statements have a climate impact statement that states:

a) How the proposal contributes to relevant goals and targets to reduce greenhouse gases;
b) Specific measures to avoid, minimise and offset emissions from the project;

c) The measures in place to ensure downstream emissions are avoided, minimized and offset;
d) The full cost of the project's emissions; and
e) Full and proper consideration of alternative options.

As a final comment, I note that public participation in the process of creating new environmental legislation and regulations is vitally important. It is extremely disappointing that NTG officers have not held public forums to explain the framework and detail of this extremely technical yet highly important area of legislative reform to the community. If amendments are made to the Draft Bill and Draft Regulations as a consequence of this consultation process, it is critically important that the NTG clearly stipulates what these changes are in published documentation, why those changes have been made, and hold public meetings to communicate any changes in an intelligible manner.

Yours sincerely

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