Submissions on the Draft *Environment Protection Act* 2019 and *Environmental Protection Regulations* 2019

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Executive Summary

Ward Keller appreciates the opportunity to provide submissions on the draft *Environmental Protection Act* 2019 (**EP Act**) and *Environmental Protection Regulations* 2019 (**EP Regulations**). We are however dismayed at the anti-development, anti-growth approach taken by these proposals. The EP Act should not be introduced at all and the EP Regulations should not be introduced in their current form.

The wholesale changes to the environmental impact assessment regime are unprecedented. It changes impact assessment from a process to a product, consolidating power in the Northern Territory Environmental Protection Authority and giving the Minister for the Environment veto power over virtually all major development in the Northern Territory. This will increase cost and uncertainty for project proponents, with negligible benefit. Open standing provisions for both administrative and judicial review will only further add costs and delay. The result will be to make it harder to attract and retain major economic activity in the Territory. These proposals are job-killers.

We cannot see any failures in current major project approvals that requires the introduction of the proposed legislation. Nor has the Northern Territory Government pointed to any systemic issues that justify the proposed legislation. Notwithstanding that we are lawyers, we do not support the significant expansion in the size (by over 10 times the number of sections and regulations without counting the objectives and triggers) and complexity of the legislation which adds substantial compliance costs and administrative burdens.

This is not to say the current system is perfect. If the problems are those of transparency and clarity then these proposals are not the solution. The solution is better application of the existing *Environmental Assessment Act* and *Environmental Assessment Administrative Procedures*. This includes:

- More focused Terms of Reference;
- Better use of the existing tiered assessment system;
- More clarity and certainty in project conditions; and
- Greater transparency in the consultation process, both within government and with external stakeholders, including members of the public at-large.

Consultation times are insufficient given the amount of new and detailed material presented and by providing only eight weeks of public consultation and then allowing Government three months to review and respond to submissions – two months of which are during the holiday season. This timeframe is wholly inappropriate and inadequate for introduction of legislation on a topic of such critical and long-term importance to the Territory's future.

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1. Introduction

We thank the Northern Territory Government for the opportunity to provide submissions on the proposed *Environmental Protection Act* 2019 (**EP Act**) and *Environmental Protection Regulations* 2019 (**EP Regulations**). We have significant and substantial concerns with the proposals, from the substance of the changes to the current environmental impact assessment regime to poor drafting of the proposals, all detailed below.

The most recent CommSec State of the States Report (October 2018) places the Northern Territory 7th of the 8 states and territories in economic performance.[1] The Territory has underperformed in the national result in all indicators. Equipment investment is down by 32% compared to the decade average. Construction work is also down in real, not just comparative, numbers. In the Mining Journal's *World Risk Report*, the Northern Territory dropped considerably from 2017 to 2018 in hard risks (including legal and regulatory risk), perceived risk, and investment risk. In investment risk, the Northern Territory is barely in the top one-third of 96 surveyed jurisdictions and lags behind every Australian jurisdiction save New South Wales. The Fraser Institute *Annual Survey of Mining Companies 2017* showed a similar deterioration on the Northern Territory's position.[2]

Especially in this light, we are at a loss as to why the Northern Territory Government would be considering such job-killing, anti-development legislation. It is antithetical to every government pronouncement about the need for job creation and population growth. No problem has been identified that requires such a wholesale change to the environmental impact assessment process, certainly not one that these changes would address, and certainly not one that requires consultation and introduction in such a compressed time frame.

This submission is structured into sections on overall policy considerations, section-by-section critique, and how to improve the current system. The first section (Section 2) addresses the principles of environmental protection in Part 2, Division 1, of the proposed Bill because those are the principles which are to ultimately guide decision-making under the legislation.

The second and third sections (Sections 3 and 4) address what are the most profound and job-killing changes from the current environmental impact assessment regime, the switch from environmental impact assessment as a process to a product with veto power over all development vested in the Minister for the Environment, and the switch to open standing for legal and merit challenges to any decision made under the EP Act. We acknowledge that the government has already indicated it will alter the judicial review/standing provisions of the proposed bill, but we are still providing comment in the absence of new language. The consequences of what has been proposed, and open standing generally, are too important not to be raised publicly. Section 5 will then address remaining sections of the proposed EP Act and EP Regulations by section and regulation number.

We strongly believe that the EP Act is not required and should not be introduced. In that light, the next sections of this submission then turns to ways we believe can improve the current environmental impact assessment regime.

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[1] https://www.commsec.com.au/content/dam/EN/Campaigns_Native/stateofstates/October2018/CommSec_State_of_the_States_October2018.pdf (accessed 29/10/2018).

[2] https://www.fraserinstitute.org/sites/default/files/survey-of-mining-companies-2017.pdf at 32 (accessed 5/11/2018).

The substance of these submissions concludes with a response to certain assertions made by the Department of Environment and Natural Resources (**DENR**) in advance of the proposals' release.

2. Principles of ecologically sustainable development (Part 2, Division 1)

We have no issue with using principles of ecologically sustainable development as considerations for decisions made under the proposed EP Act. Indeed, it is to be expected. Much of what appears in the proposed legislation, though, seems to paraphrase the principles as they appear in different source documents, and sometimes in a manner that leaves out key features of the principle. The result of this paraphrasing and 'pick and choose' approach is a process that will be expressly driven by anti-development objectives.

Please provide the source of the language used in each of sections 15 through 21.

2.1. Section 15, Decision-making principle

The decision-making principle, as it is written, provides little context for the objects of the legislation. The principle, as it appears in section 3A(a) of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), is "decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations" (emphasis added).

If the EPBC Act is the source of this principle, please explain why the emphasized language has been removed.

2.2. Section 16, Precautionary principle

The precautionary principle as it was adopted in 1992 by the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil (the Rio Declaration on Environment and Development, generally known as the **Rio Declaration**), provides in part that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (emphasis added).

Section 16 of the EP Act does not refer to cost-effectiveness. Please explain why section 16 eliminates the concept of cost-effectiveness from the principle.

2.3. Section 17, Principle of intergenerational equity

Section 17 in the proposed legislation reads, “The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.” The principle adopted in the Rio Declaration actually provides “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” The principle contains an explicit right to develop, expressly noted in the 1997 Report of the Secretary General on application and implementation of the Rio Declaration.

Please explain why the legislation has written the right to develop out of the principle.

3. Changing the impact assessment to a process with veto power vested in the Minister for the Environment

The purpose of environmental impact analysis is to provide decision makers with sufficient data on environmental impacts to make informed decisions about whether a project with potentially significant environmental effects should proceed, balancing a variety of factors and policies that includes both environmental and economic development.

The approach taken in Part 7 of this legislation turns the purpose of environmental assessment on its head. It takes what is supposed to be a process and turns it into a product. It creates a substantial level of additional bureaucracy. The additional approval process adds time and uncertainty to an already lengthy process. It is a roadmap to 'death by delay', especially when combined with the open standing provisions of sections 214 and 254-255, discussed below. It is disheartening that a government that is focused on job creation would introduce such job threatening legislation.

We oppose the entire concept of "environmental approvals." Part 7 gives the Minister for Environment veto power over virtually every major development project in the Northern Territory. The scope of power this legislation grants to the Minister is breathtaking, and there is no other Australian jurisdiction of which we are aware in which so much authority is granted to a Minister with the portfolio of the environment.[3]

Not only does the legislation grant the Minister the ability to refuse an environmental approval after environmental impact assessment has been conducted (section 86), it grants the Minister the power to establish criteria that triggers environmental impact assessment in the first place (section 37), and the power to establish environmental objectives by which an environmental impact assessment is presumably measured (section 36). This even extends to transfers of environmental approvals already granted (section 113). There appears to be no appeal from the Minister's decisions.

Based on data from the NT EPA website, the average (mean) time since 2010 for projects for which an EIS was required took over 900 days to get from Notice of Intent to assessment report. For mining projects, the mean was over 1100 days. Even if one uses the median rather than the mean, the figure is still over 900 days for mining projects.

Project proponents should not be subject to additional delays beyond what is already a lengthy and robust process. Environmental impact assessment should remain a process, with decision-making authority vested in the Minister responsible for the sector in which the project lies, with consideration for the recommendations of the NT EPA and Minister for the Environment.

In approving an underlying action, however, the decision-maker with responsibility for approving the action should also be required to declare or certify any EIS for the action (or

[3] See, e.g., *Environmental Effects Act 1978* (Vic) ss 8-8E; *State Development and Public Works Organisation Act 1971* (Qld) ss 34D, 52; *Environmental Planning & Assessment Act 1979* (NSW) Div 5.1, subd 3; *Development Act 1993* (SA) s 48; *State Policies and Projects Act 1993* (Tas) s 26. Even in Western Australia, which vests more authority in the Minister for the Environment than other States, agreement with other responsible Ministers is required and there is an internal appeal process if there is disagreement amongst Ministers. See e.g., *Environmental Protection Act 1986* (WA) ss 45(1)-(4).

other document assessing environmental impacts) as having been prepared in compliance with the legislation and regulations. This will provide clarity as to the finality of the environmental impact assessment process for purposes of any relevant statute of limitation.

4. Open Standing

Sections 214 and 254-255 of the EP Act are an open license to litigate, effectively throwing the concept of standing out the window. Part 12, Division 1 of the legislation, is a threat to Territory jobs. These same comments apply to Part 14.

Under this section, anyone and everyone can sue to overturn a decision (or even a non-decision) and potentially do so with little fear of a cost award, the discretionary language of section 223 notwithstanding. This can be most readily seen in defining an eligible applicant as a person indirectly affected by the alleged act or omission. While the proposition, for example, that unborn children have standing in environmental litigation may seem far-fetched to the Territory, courts elsewhere have use the principle of intergenerational equity[4] in environmental litigation to hold that indirect impacts on future generations is sufficient to grant standing to children yet to be born.[5] Under this section, a person outside of Australia challenging a Northern Territory project because he or she dislikes the emissions that may emanate from the project could also be an eligible applicant because he or she breathes from the same atmosphere into which the Territory project is emitting pollutants.

These standing provisions will draw Territory courts into policy battles best left for the Legislative Assembly and executive decision makers. That the courts might use their powers to weed out inappropriate proceedings would not be a sufficient response to that concern. There is no guarantee of that outcome, and courts should not be put in that position in the first instance.

Under these 'no standing necessary' provisions expect litigation over every politically contentious project, regardless of the level of environmental impact assessment conducted. Decisions to not require assessment will also be subject to challenge. This problem might be less likely in a more populous jurisdiction with a relatively large number of environmental assessments concluding at any given time. If nothing more than a function of the availability of resources, legal battles can only be waged on so many fronts at once. This is unlikely to be the case in the Territory, however, where the number of impact assessments is relatively small and development projects attract national, and even international, scrutiny.

It should be recognized that the objective of environmental litigation is often simply to delay a project to the point it becomes financially infeasible. For a business to now have to factor in the extra layer of bureaucracy created by this legislation, along with the time, cost, and uncertainty of litigation, on top of a process that already takes an average of over 900 days from Notice of Intent to assessment report will only encourage business to seek investment opportunity outside the Territory.

Environmental approvals and the underlying physical development to which they may relate are not the only matters covered by the EP Act that are subject to open standing provisions.

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[4] EP Act s 17; see above section 2.3.

[5] *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*, 33 ILM 173 (1994) (Philippines Supreme Court); see also *Juliana v United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (United States District Court).

Under Schedule 3 enactment of triggers and objectives could also be subject to litigation because they go too far or don't go far enough. Virtually any decision the Minister, CEO, or NT EPA might make under the legislation is subject to open standing litigation.

We also note that "undertaking" and "activity" are not defined in the proposed legislation and could extend beyond physical development and public works projects. See sections 5(1)(c)-(d). As such, it is entirely plausible that any regulatory enactment by the Territory government that has a potentially significant impact on the environment could also be subject to the environmental impact assessment regime because the legislation would bind the Crown. See section 11. That means that regulatory enactments by the Territory government pursuant to other legislation could also be subject to litigation for failing to comply with the terms of the proposed EP Act and EP Regulations.

These open standing provisions apply not just to the lawfulness of the decision-making process. They are equally applicable to merit review before the NT Civil and Administrative Tribunal challenging the wisdom of the decision,[6] which can then presumably be appealed to the Northern Territory Supreme Court, effectively giving an applicant a second chance and increasing delay. [7]

The effects of sections 214, 254, and 255 are so far-reaching that they bear repeating. Virtually anyone can challenge any action required by the EP Act and potentially do so in multiple forums. An eligible applicant is not required to show to the courts a special interest in the matter beyond the interest of the public at large. An eligible applicant is not required to show that she is harmed or otherwise directly affected by the decision. An eligible applicant is not required to have participated in any administrative process leading to the decision.[8] "Any person may seek judicial review of a decision of the Minister, the CEO, the NT EPA or an environmental officer under the Act whether or not any right of the person has been affected by, or as a consequence of, the decision."[9]

We recognize there are those who consider the 'special interest' test an applicant must meet for standing in much Commonwealth environmental litigation to be too high a bar. The response, however, should not be to eliminate standing requirements altogether. In order to be an eligible applicant, applicants should still be required to show they are directly affected, whether a person, a business, an Aboriginal Land Council, a Registered Native Title Prescribed Corporate Body, or a local government. The United States *National Environmental Policy Act* 1969, the legislation on which much western environmental assessment law is based, requires that an applicant have participated in the process, have an injury-in-fact, and that the injury is within a zone of protected interest – an environmental interest for example,

[6] Section 255. We also question whether NTCAT will be adequately resourced, both financially and technically, to address what may be highly complex and technical environmental matters.

[7] We also note that recently the introduced *Petroleum Legislation Amendment Bill 2018* also has open standing provisions. See section 57ABA and regulation 29AA. Open standing provisions here would give opponents of projects covered by that legislation even more bites of the proverbial apple.

[8] In this regard, sections 214(2)(f)-214(3) and 255(4)(f)-255(5) are almost meaningless because of the "indirectly affected" language of sections 214(2)(a) and 255(4)(a). It is entirely plausible that the former would be subsumed into the latter.

[9] Section 254.

as opposed to an economic or pecuniary interest. Those are appropriate standards at the least for any change in standing requirements in the Northern Territory.

5. Comment on other sections of the EP Act and EP Regulations

5.1. Draft EP Act

5.1.1. Section 4, Definitions

Defining "strategic assessment" as "a strategic assessment carried out in accordance with the regulations" is meaningless. The regulations merely provide a process. Nowhere in the proposed legislation or regulations is the concept of a strategic assessment explained or how it differs in substance from a standard assessment. See also submissions provided below in section 5.1.11.

5.1.2. Part 2, Division 2, Management hierarchy

While the EP Act provides for management hierarchies, there is no adequate provision of a policy framework hierarchy. The legislation refers to principles, policies, objectives, and triggers. Presumably, these all relate to each other in some fashion. The legislation should clearly explain the hierarchy and how each links back to the instrument above it in the hierarchy.

5.1.3. Section 26, Contents of environmental protection policy

Section 26 seems to suggest that the Minister may – but is not required to – enact environmental policies that will serve as criteria by which the significance of environmental impacts can be measured. The text of the section is not entirely clear in this regard.

If decisions and approvals are going to be made based on the significance of environmental impacts, then the content of environmental policies must (not may) include objective criteria, thresholds, or benchmarks by which those impacts can be measured. Those criteria, thresholds, or benchmarks must also be enacted into regulation and not sit outside the regulation as 'soft law' guidelines. Project proponents deserve regulatory certainty in this regard. This has been a failing of the current environmental assessment regime.

There is also no clarity in the distinction between a policy and an objective (see section 36).

5.1.4. Section 33, General environmental duty

The general environmental duty comes from section 12 of the *Waste Management and Pollution Control Act* and is provided there within the context of commercial waste management and harm to the physical environment. The concept has been expanded substantially in the proposed legislation to encompass virtually every commercial activity, subject only to the defence in section 35(4).

Please explain how compliance with a general environmental duty differs from compliance with a Ministerial decision or a decision of the NT EPA (or its CEO) under the EP Act. Further, please provide the justification for such a wide-ranging change to the scope of the duty.

5.1.5. Sections 36-48 (Part 5, Division 1), Declaration of objective and triggers

There is no adequate definition of a referral trigger or an approval trigger in the legislation. What seems to appear from section 37(1)(a)-(b) is that a trigger will be some objective standard or criteria by which it could be determined that there might be a potentially significant impact triggering environmental impact assessment.

More importantly, however, missing from both the proposed legislation and the proposed regulation is any language with regard to objective thresholds by which the significance of an impact is to be measured once the decision to require an Environmental Impact Statement (**EIS**) or other form of assessment has been made. If this is the purpose of objectives, then the legislation or regulations should say so.

5.1.6. Section 37, Declaration of environmental triggers

The legislation does not define or explain the difference between a referral trigger and an approval trigger. Defining them in an external fact sheet, but not the legislation itself, is not appropriate.

5.1.7. Part 5, Division 2, Declaration of protected environmental areas and prohibited actions

This Division gives the Minister for the Environment the power to declare permanent development moratoria based on location and/or activity. We disagree with vesting this extraordinary grant of power in a single person. A more appropriate approach would be to grant only the power to declare short locational or activity-based moratoria, no more than 90 days, with one possible extension. It should then be left to the Legislative Assembly to decide whether such a draconian action as longer or permanent moratoria should be put in place.

5.1.8. Section 49, Declaration of protected environmental areas

What is, or will be, the relationship between Sites of Conservation Significance and protected environmental areas?

5.1.9. Section 52, Consultation on proposed declarations

A thirty-day consultation period is too short to ensure adequate consultation. The consultation period should be at least sixty days. To ensure adequate transparency, the section must also apply to temporary declarations; section 52(5) should be deleted.

5.1.10. Section 59(1)(b)(v), Purpose of environmental impact assessment process

What does 'desirable' mean? Use of the conjunctive "and" means it is something other than "less environmentally damaging alternatives", but the reader is left to wonder what.

5.1.11. Part 6, Division 3, Referral and assessment of proposed action

Please confirm that actions for which the environmental impact assessment process has been completed (which the NT EPA website identifies as the making an Assessment Report and its provision to the Minister) are not considered "proposed" for purposes of the Division.

5.1.12. Section 63(1), Referral of proposed action

See section 5.1.6. There is no adequate explanation in the legislation of the difference between a referral trigger and an approval trigger.

5.1.13. Sections 63-64, Referral of proposed action and Referral for strategic assessment

Under section 63(1) a proponent must refer for a standard assessment a proposed action that meets a referral trigger, meets an approval trigger, or has the potential to have a significant impact on the environment.

Under section 64, a proponent may refer for strategic assessment a proposed action that will meet a referral trigger, will meet an approval trigger, or will have the potential to have a

significant impact on the environment. The placement of the conjunction "or" means that "a proposed action" in section 64 is independent of a "group of actions".

If a proponent of a proposed action seeks a strategic assessment under section 64, she would be in contravention of section 63(1), unless she seeks referral under both sections.

This, however, begs the bigger question. What exactly is a strategic assessment and how does it differ from a standard assessment? Nowhere in the proposed legislation or regulations is that provided. If what the drafters of this legislation have intended is to cut and paste the concept from the EPBC Act, then we note that strategic assessments refer to assessment of policies, plans or programs – not assessment of what would colloquially be described as shovel-ready projects – and the proponent is the entity responsible for implementation.[10] In the Northern Territory, that will most likely mean self-referral by the Northern Territory government for any regulatory or administrative action that meets a trigger or will have the potential for a significant impact on the environment.

5.1.14. Section 73, Application for approval notice

Section 73, and indeed all of Part 6, Division 4, makes little sense as written. Under section 73, the action will already possess an environmental approval. What is the purpose of yet another approval notice?

This confusion is the result of the failure to explain and properly define a strategic assessment. The Division only makes sense if it is made clear that it applies to situations where a plan, policy, or program has been approved after strategic assessment, and a subsequent proposal is within the envelope of that plan, policy or program. The legislation does not do this.

5.1.15. Section 87(1), Matters to be considered by Minister in deciding on environmental approval

In light of sections 14(2) and 15-21 of the proposed EP Act as the have been drafted, it is legally questionable whether the Minister can consider economic factors in making a decision on whether to grant or deny an environmental approval. Is this the intent of the section?

5.1.16. Sections 82, 89-92, Statement of unacceptable impact

NT EPA should not be engaging in value judgments as to whether impacts are acceptable or unacceptable. A value judgement of this nature involves the weighing of competing social, commercial, or economic benefits against an environmental impact. Those judgments are province of the ultimate decision-maker, <u>not</u> NT EPA. This appears to be an attempt by NT EPA to box in the Minister's decision-making power.

The NT EPA role should be limited to providing objective analysis and conclusions with respect to environmental impacts. More specifically, NT EPA should be limited to determining whether a potentially significant environmental impact identified during the environmental impact assessment process can be avoided, mitigated, or offset to a level less than significant as measured by objective criteria. It is then up to the decision maker, not NT EPA, to make the value judgement as to whether the residual impact is acceptable or unacceptable based on all relevant considerations.

In this light, the entirety of Division 3 (sections 89-92) should also be eliminated.

[10] See EPBC Act s 146.

5.1.17. Part 7, Division 9, Transfer of environmental approval

A potential transferor of project entitlements should not be subjected to multiple and potentially duplicative transfer approval requirements. All transfer approvals should be vested only in the Minister or decision-making authority for the sector that encompasses the project.

5.1.18. Section 121 (Part 9, Division 1, generally), Financial provisions

Projects which already subject to security requirements pursuant to other legislation, such as the *Mining Management Act* (**MM Act**), should be exempt and not subject to further bonding requirements. "Double-dipping" and other increased financial burdens will only inhibit growth and investment in the Territory.

5.1.19. Section 127 (Part 9, Division 2, generally), Environmental protection levy

The increased taxation of the "environmental taxation levy" is yet another unjustified burden on industry that will inhibit growth and investment in the Territory. A business should not be saddled with a levy that neither has a direct nexus to the project or addresses specifically identified legacy issues within that project's sector.

Moreover, with respect to the mining industry, this levy is a double tax; section 44A of the MM Act already provides for a levy "for the effective administration of this Act in relation to minimising or rectifying environmental harm caused by mining activities." Projects subject to section 44A should not be subject to this double taxation. Section 128(2) is insufficient protection, as project proponents will also be subject to double taxation through non-refundable financial assurances,[11] along with environmental protection bonds.[12]

Any purpose that does not have a direct nexus to the project or specifically identified legacy issues within that project's sector should not be funded through a project-specific levy.

5.1.20. Section 130 (Part 9, Division 3, generally), Environmental protection funds

The concerns raised with regard to levies in Part 9, Division 2, are equally applicable to the environmental protection funds provisions of Division 3. Levy-based funds should address no more than project-specific issues or specific identified legacy issues within that sector that are not addressed elsewhere.

5.1.21. Sections 135-136, 138-139, Environmental audits

The current EA Act and EAA Procedures do not expressly provide for post-approval auditing procedures. That authority generally resides with the relevant decision-maker and through legislation directly addressing those underlying actions. For example, post-approval monitoring of mining activity would occur through review of a Mining Management Plan in accordance with the MM Act. NT EPA has the authority to require audits of holders of an environmental protection approval or license pursuant to the *Waste Management and Pollution Control Act* (**WMPC Act**).

The proposed bill and regulations essentially lift the auditing provisions from the WMPC Act, but expands the powers of the NT EPA and its CEO to order and undertake audits. The WMPC Act generally requires some open and transparent trigger based on a contravention of the Act for an audit, such as the issuance of a pollution abatement notice or a court order, although

[11] Section 196.

[12] Sections 122-123.

as identified above that may not always be the case. Nevertheless, the proposed bill provides no such standards at all.

We recognize that the purpose of post-decision monitoring is to ensure compliance with conditions of approval. We object, however, to the incredibly open-ended nature of auditing as described in proposed bill. NT EPA and its CEO should not be granted license to go on fishing expeditions. The purpose of an environmental audit should be limited to determinations of whether an approval holder is compliant with conditions of approval applicable to an action. Further, an order or notice to prepare a post-approval audit should be limited to situations where the Minister or statutory decision-maker believes or suspects on reasonable grounds that:

- the approval holder has contravened, or is likely to contravene, a condition of the approval, or

- the environmental impacts of the action are significantly greater than indicated in the information available to the Minister or statutory decision-maker when the approval was granted.

This comports with the purpose of environmental audits provided for in section 458 of the EPBC Act. It also comports with the intent of the audit provisions of the WMPC Act, which generally requires some underlying open and transparent trigger for an audit, such as the issuance of a pollution abatement notice[13] or a court order.[14]

Please also note that our references above to an "approval" is not to be taken as tacit support for the concept of an environmental approval by the Minister for the Environment. Our objections to environmental approvals are noted elsewhere in this submission.

Based on the two-stage approach that DENR claims to have taken in regards to proposed changes to the environmental protection regime generally, we do not believe that expansion of the auditing system should be considered at this stage. Please see our comments below in section 8. We also note the dearth of environmental auditors based in the Northern Territory as an additional reason for not expanding the environmental auditing regime at this time. See below section 5.2.19.

5.1.22. Section 182, Closure notices

Section 182(1) is virtually unintelligible. What is appears to say is the Minister may issue a closure notice at any time if he or she believes that any activity will be required at the site after expiration of an environmental approval based on nothing more than a "reasonable" belief.

5.1.23. Sections 185-187, relationship of closure notices to owners/occupiers of land

With respect to mining activity in particular, the actions authorised here unfairly mix mineral title with land title to the detriment of landowners such as pastoralists, who have no control over the actions of the party at whom any notice should be directed. Landowners or other occupiers of land should not suffer a record on land title for actions over which they have no control.

[13] WMPC Act s 48(1)(b).

[14] WMPC Act s 49.

Even worse, the language in these sections suggests that innocent parties will not only suffer a record on title, they would be legally required to undertake the activities specified in a closure notice. A lodged notice is binding on the landowner/occupier of the land pursuant to section 186(2), imposing responsibility on occupier/landowner liability pursuant to section 183(1) for the actions specified in the notice.

The discretion provided for in section 185 is of no comfort, especially given the extreme discretion given to the Minister to issue a closure in the first instance under section 182(1) and the total lack of transparency in the process. The entirety of Part 11, Division 4 should be scrapped in favour of an approach more akin to pollution abatement notices in Part 10, Division 2 of the WMPC Act.

5.1.24. Section 196, Requirement to provide financial assurance

The non-refundable nature of a financial assurance and the ability to direct it away from the project for which it is assessed (albeit after 20 years) makes it look remarkably similar to a levy, allowing for double taxation on a project owner/operator.

The purpose of a financial assurance in section 196(2) also looks quite similar to the purpose of an environmental protection bond in section 122(3), leading to the potential for an unfair double assessment on a project.

5.1.25. Section 198, CEO may accept enforceable undertaking

What is both the relationship and the difference between enforceable undertakings (section 198), financial assurances (section 196), environmental protection bonds (section 122) and environmental levies (section 127)?

5.1.26. Section 220(c), Other civil orders

Section 12 of the EP Act provides that civil remedies and the common law are not affected by the legislation. As such, awards for damages should not be provided for in the EP Act. Actions challengeable under the legislation should only be those for which damages are an inadequate remedy at law.

5.1.27. Section 225, Time for bringing proceedings under this Division

A three-year statute of limitation is too long and will only increase the uncertainty that inhibits investment and job creation. The time for commencement, at least for challenges to a decision on an assessment (either in the first instance or modification), should be more than between 60 and 90 days. This comports with analogous provisions in other jurisdictions, falling in between the 22-day limitation period for appealing certain assessment-related decisions to the Queensland Land Court[15] and the three-month period for bringing a challenge to the validity of a development consent in New South Wales.[16] We also note that the judicial review provisions of the recently introduced Petroleum Legislation Amendment Bill refer to Order 56 of the Northern Territory Supreme Court, which provides that proceedings must commence within 60 days after the date when grounds for the grant of the relief or remedy claimed first arose.

[15] *Environmental Protection Act* 1994 (Qld) s 525.

[16] *Environmental Planning and Assessment Act* 1979 (NSW) s 4.59.

The conclusion of an environmental impact assessment process must provide a reasonable level of certainty to the party who has prepared the EIS or other applicable assessment documentation. A three-year statute of limitation, at which time a project may be well underway, provides no such security.

The same reasoning equally applies equally to decisions with respect to objectives and triggers. Environmental impact assessment based on those factors may be well under way within a three-year period. Parties who must rely on those factors must be afforded a reasonable level of certainty with respect to that reliance.

The underlying problem with the entirety of section 225 is that it generally treats judicial review of assessment-related decisions by government identically to actions/prosecutions alleging a contravention of the EP Act more akin to the breach of a condition of an environmental protection license or approval. The two are fundamentally different. The Northern Territory government has committed itself to addressing the latter at the second stage of its environmental reform efforts, when it reviews how it will manage waste, pollution, clearing of native vegetation and the environmental impacts of mining activities. It should not be addressing the time limit for environmental prosecutions now.

That aside, three years is still excessive. By comparison, it is three times longer than section 94 of the WMPC Act.

5.1.28. Section 227, CEO may recover civil penalty

This section appears to suggest that the CEO may threaten criminal action to gain leverage in a civil action that may or may not have yet been filed. This should be approached with extreme caution. Such an action could be considered a violation of section 34.1.2 of the Australian Solicitors Conduct Rules 2015 (**ASCR**). While the Northern Territory has not yet adopted the ASCR, they are operative in the vast majority of Australian jurisdictions.[17]

5.1.29. Part 12, Division 1 generally, Injunctions and other proceedings

Any proceeding based on Ministerial action should be limited, as an evidentiary matter, to the record before the Minister at the time of his or her decision. Subject to possible exceptions related to transparency in the decision making process, litigation must not be the first time at which inadequacies in the Ministerial decision or underlying documentation (to the extent the public had a right of access) are identified. While an applicant may not have meaningfully participated in the environmental impact assessment process below, any issue raised in a civil proceeding should nevertheless have been raised prior to litigation with sufficient particularity to avoid unjustified obstructionism.

5.1.30. Section 268, Transition provisions

Environmental impact assessment, especially if an EIS is required, is a long and expensive process that can take several years. There are currently two projects whose EIS are open for public comment and another thirteen at various other stages of the assessment process. The proponents of these projects should not be penalized by having the rules changed in the middle of the game. Transition provisions should give these project proponents the opportunity to complete the assessment process under the current assessment regime.

[17] See https://lawsocietynt.asn.au/about-lsnt/news/765-review-of-the-australian-solicitors-conduct-rules.html (accessed 19 October 2018).

5.2. Draft Environment Protection Regulations

5.2.1. Part 4, Referral of proposed actions

Referral should be better defined in the proposed legislation and regulations. The phrase does not appear in the current EA Act or EAA Procedures. Again, if concepts are lifted from statutes in other jurisdictions, they should be fully defined in the legislation, not in some external document.

5.2.2. Regulations 26-27, accepted referrals and consultation with relevant government authorities

It would be of assistance to declare what the purpose of the submissions on a referral would be (see regs 26(2)(b), 27). While not entirely clear, it appears that the purpose would be to seek information that would inform NT EPA's decision under regulation 28 and to inform the Terms of Reference, if any.

5.2.3. Regulations 31, 35, 41, Accepted referrals

We believe decisions and statements of decision should be published within a time specific and not left to the imprecise "as soon as practicable after the decision." Proponents of an action deserve certainty in the finality of the decisions that these proposed regulations as drafted do not provide.

5.2.4. Regulations 32-35, Accepted referrals

Please refer above to the discussion of strategic assessments above in section 5.1.11.

5.2.5. Regulation 48, Power to obtain advice

It should be made clear that third parties can be engaged by NT EPA during the assessment process only after notice is provided to the proponent of an action and that the proponent has the opportunity to weigh in on the decision. This is especially so if the proponent will be required to meet those third party costs.

5.2.6. Regulation 50, Power to require proponents to meet certain costs of assessment process

Our comments on regulation 48 notwithstanding, we believe that if the NT EPA choses to seek outside advice it should do so its expense, not at the expense of the project proponent.

5.2.7. Regulation 54, NTEPA may consider method of assessment

If the method of assessment refers to standard versus strategic assessment, please refer to the discussion above in sections 5.1.11. Strategic assessment does not appear to be a method of assessment applicable to construction ready projects, leaving standard assessment as the only available method.

If however, regulation 54 is referring to, as examples, an assessment by supplementary environmental reports or an EIS, we object to any reconsideration of the method of assessment in the middle of the assessment process. A project proponent should be able to rely on the certainty of the assessment methodology in place at the time the decision on methodology was made absent specific and relevant findings based on proponent-initiated variations to the action.

Substantial new information about impacts may only become known as a result of analysis during the assessment process. That should not give NT EPA license to go back and change the rules mid-game.

5.2.8. Regulations 67-69, Terms of Reference

If the purpose of inviting submissions after the referral is to inform the Terms of Reference, then what is the purpose of another submission period on draft Terms of Reference? See regulations 68(c) and 69(b). We believe it creates unnecessary delay in publication of the Terms of Reference. Opportunity for further submission will exist with regard to the draft EIS.

NT EPA should, of course, be working and consulting with relevant government authorities during the entire process of preparing Terms of Reference. See regulation 69(a).

We appreciate that the regulations provide a maximum time frame of 70 days for issuance of Terms of Reference from the time a decision is made about the method of assessment.[18] We question, however, how realistic this time frame is. For three of the last 4 projects for which assessment has been completed (Lee Point MPUD, Ammaroo Phosphate Project, and Mount Peake Project) it took NT EPA approximately 8-9 months to get from Notice of Intent to Terms of Reference. The time frames are also directory rather than mandatory. There is no penalty for NT EPA's failure to comply. Compliance is a matter of convenience rather than substance.

5.2.9. Regulation 86(2)(b), Extension of assessment period

NT EPA should not be able to change the rules mid-game absent specific findings that baseline conditions identified in the referral have changed so drastically as to warrant amendments to the Terms of Reference. The need for an extension, in and of itself, should not warrant amending Terms of Reference.

5.2.10. Regulations 87-88, Statement of reasons and notice

Preparation of a statement of reason and notice should also extend to decisions to refuse to extend the assessment period.

5.2.11. Regulation 99, Further consultation

Any interested party should be allowed to provide a submission on a supplement to an EIS. NT EPA, however, should not be required to consider information of a nature that could reasonably have been brought to the attention of NT EPA during the submission period on the draft EIS. This will serve the purpose of a more complete opportunity for public participation without creating the potential to 'sandbag' the proponent of an action at the last minute.

5.2.12. Regulation 114(2), Preparation of an assessment report

The NT EPA should not be able to consider information based on its' own investigations and knowledge or "any other information that [it] considers relevant" in preparing an assessment report unless that information has been presented to the proponent of an action in accordance with the regulations during the environmental impact assessment process. A proponent must be afforded the opportunity to know of and be respond to any and all information that will inform the assessment report. It would be fundamentally unfair to a proponent, and a potential violation of natural justice, to not so provide.

[18] EP Regulations 67, 68(3), 70(3). This assumes that publication of the draft Terms of Reference pursuant to regulation 67 and publication of notice of the draft Terms of Reference pursuant to regulation 68(3) are at the same time.

5.2.13. Regulation 115, Draft environmental approval

We again note our objections to both environmental approvals and statements of unacceptable impact. Environmental impact assessment should not become a product. It should remain a process, with decision-making authority vested in the Minister responsible for the sector in which the project lies (or other statutory decision-maker), taking account of recommendations of the Minister for the Environment with the benefit of a report from the NT EPA.

5.2.14. Regulation 117, Consultation

With regard to regulation 117(1), please refer to our comments above in section 3. Environmental impact assessment should not become a product. It should remain a process, with decision-making authority vested in the Minister responsible for the sector in which the project lies (or other statutory decision-maker), based on the recommendations of the NT EPA and Minister for the Environment.

The approach taken by the regulation turns the approval process upside down. Generally, the current process has the Minister with responsibility for the sector encompassing the action making a decision based on recommendation from the Minister for the Environment. Regulation 117(1) reflects a process in which the Minister for the Environment makes a decision on the project considering advice from the Minister with responsibility for the sector encompassing a project – and with license to reject that advice and veto the project. We object strongly to this approach.

With regard to regulation 117(2), NT EPA should not have the discretion to withhold a draft assessment report or other recommendation from the transferor.

5.2.15. Regulation 135, Application of Part 7

The reference should be to section 67 of the Act.

5.2.16. Regulation 142(c), Matters NT EPA must consider in relation to variation

Regard should be had not just for new or additional areas impacted, but the actual amount of new or additional areas impacted.

5.2.17. Part 8, Registration of environmental practitioners

Using the definition provided in regulation 176, there are many people in allied or related professions who may be engaging in environmental work and who are registered or licensed in that other profession. Someone licensed or certified as a practitioner in a related field should not also be required to register as an environmental practitioner.

We note that with respect to lawyers practicing environmental assessment law (or lawyers generally), additional registration requirement that affect the practice of law may be inconsistent with the *Legal Profession Act* and *Legal Profession Regulations*.

5.2.18. Regulation 176, Meaning of *environmental work*

There is no public vetting of requirements and qualifications before they come into force. We believe there should be some consultation period.

5.2.19. Part 9, Registration of environmental auditors

We are of the understanding that there are no registered environmental auditors in the Northern Territory. The NT EPA does approve and register persons who are accredited under

either the New South Wales Site Auditor Scheme (NSW) or the Victorian Environmental Auditor Scheme (VEPA) as a class of persons suitable to undertake environmental audits in the Territory, but the result (not unexpectedly) is that virtually every person on the register is based in either New South Wales or Victoria.

We understand the value of relying on an accreditation from a jurisdiction with greater resources and capacity to undertake independent accreditation than the Territory. The cost of bringing in a registered auditor from interstate, though, can be prohibitively expensive. We encourage the Northern Territory government to investigate and do what it can to expand the pool of registered auditors to include people and entities based in the Territory.

6. Whether the bill and regulations should even be introduced

The proposed EP Act is not required and should not be introduced. The proposed EP Regulations should not be introduced in its current form. What is required is better administration of the existing EA Act and EAA Procedures and greater transparency in the EIA process. Some amendments to the EA Act and EAA Procedures might be necessary, but the wholesale revision created by the EP Act and EP Regulations is not.

7. How the current EIA system could be improved

7.1. How NT EPA determines whether an action may have a significant effect on the environment

The objective of the current EA Act is "to ensure, to the greatest extent practicable, that each matter affecting the environment which is, in the opinion of the NT EPA, a matter which could reasonably be considered to be capable of having a significant effect on the environment, is fully examined and taken into account". There is little regulatory guidance, however, on what NT EPA considers "a matter which could reasonably be considered capable of having a significant effect on the environment".

Further refinement and consistency of application in this regard is necessary. While NT EPA currently uses Guidelines to make its determinations, openness, transparency, and consistency would be better served through the use of objective measures, thresholds, or triggers (whatever they may be called) adopted through the regulatory process.

7.2. Public Environmental Report

NT EPA Guidelines provide for a tiered approach to environmental impact assessment through use of either a Public Environmental Report (**PER**) or EIS when impact assessment is required. The NTEPA *Guide to the EIA Process in the NT* describes a PER in this fashion:

> A Public Environmental Report (PER) is called for to assist in assessing environmental impacts which are considered significant but limited in extent. It is not a precursor to an EIS. Key points on a PER: • single or limited number of environmental issues; and • limited magnitude, duration, frequency and extent of impact.

NT EPA appear to have abandoned use of PER entirely in favour of EIS. We believe PER should have been used, but was not, for numerous projects, including:

- Core Exploration Grants Lithium Project
- Project Sea Dragon Core Breeding Facilities and Broodstock Maturation
- Jemena Northern Gas Pipeline

- Territory Iron Frances Creek Mine (Elizabeth Marion Area)
- ABM Resources Twin Bonanza Gold Mine

We believe the Territory can make much better use of PER by, for example, making changes to the existing EAA Procedures to allow for public comment.

7.3. Terms of Reference

Terms of Reference (**ToR)** should be more focused. The emphasis must be on critical issues, not general issues that often result in unnecessary studies and consultants reports. NT EPA should avoid just taking the last ToR and simply adding further requirements arising from the action in question. Outcomes of previous relevant EIS, however, should be used to inform, refine and ultimately streamline ToR for similar projects.

7.4. Conditions of approval

Recommended conditions of approval in an Assessment Report should be targeted, well defined, and clear.

- Assessment Reports should avoid requiring general commitments to the law or simply re-stating the law.
- Assessment Reports should respect the role of the primary regulator. This is not simply an issue of oversight. Under the proposed EP Act and EP Regulations, NT EPA usurps the role of the primary regulator in many instances.
- Assessment Reports should avoid recommending NT EPA supplant the job of the relevant decision-maker.
- Assessment Reports should avoid over-use and over-reliance on independent consultants.

7.5. Consultation requirements

We question whether the requirement in regulation 8(1) of the EAA Procedures that NT EPA consult with and obtain comments from advisory bodies and the responsible Minister is being rigorously and properly applied. More than just a conclusory statement in the assessment documents that NT EPA has complied with the regulation should be required and any responses from advisory bodies and the responsible Minister should be publicly available.

8. Responding to certain assertions made by DENR; inadequacy of the consultation and introduction period

DENR has made certain assertions in public fact sheets on the proposed legislation that are at odds with the legislation and regulations themselves. The disconnect between some of these assertions and the actual language being proposed is of concern.

DENR refers to the environmental protection legislation as a two-stage program. The first stage would reform of the environmental impact assessment process, while the second stage will reform how the Territory manages its wastes, pollution, clearing of native vegetation and the environmental impacts of mining activities. In some respects, however, the first and second stages have been conflated, meaning certain second stage topics will be a 'done deal' by the time second-stage consultation begins.

The concept of environmental audits come directly from existing pollution control legislation, and expands its scope and breadth, not just with respect to environmental impact assessment, but also with waste management, pollution control, and the environmental impacts of mining. Environmental audit provisions are currently provided for to the extent a project has an environmental protection license or approval or, in the case of mines, has an MMP subject to periodic review and approval. The Northern Territory government's professed adherence to a two-stage process means that environmental auditing should not be addressed until the second stage.

DENR also claims that the 'tiered' assessment approach is new; however, the current system already has a tiered assessment approach;

- Assessment on referral
- Assessment of PER
- Assessment of EIS

As we have noted above, though, DENR and NT EPA appear to have effectively abandoned the use of PER.

Finally, we note a concern with the periods provided for consultation and introduction. The Northern Territory government has provided an eight-week window to provide submissions on 482 sections of proposed legislation and regulations where 29 sections currently exist. It is then giving itself approximately three months to review and respond to any submissions before its intended introduction, two months of which are during the December 2018 and January 2019 holiday season. We believe this is a wholly inadequate period for consultation and introduction of legislation and regulations on a topic of such critical importance to the Territory's economy.

9. Qualifications of the submitters

Ward Keller is the Territory's oldest and largest law firm. It is owned by and staffed by Territorians with offices in Darwin, Palmerston, Casuarina and Alice Springs. Ward Keller has been heavily involved in major Territory projects and environmental impact assessment over the last several decades. The firm acted for the project proponent in eight of the last ten completed Environmental Impact Statements.

Partner Kevin Stephens has practiced in the mining, projects and infrastructure, and pastoral law sectors for over twenty years. Collectively, Ward Keller lawyers have decades of experience in environmental impact assessment law in the Northern Territory, interstate, and internationally.