



Review of the
Northern Territory
Environmental Assessment and
Approval Processes

May 2015

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Mr John Coleman
Chief Executive Officer
Department of the Chief Minister
DARWIN NT 0800

Dear Mr Coleman

The Commonwealth Government is endeavouring to deliver a 'one-stop-shop' for environmental approvals that will accredit State/Territory planning systems under national environmental law and create a single environmental assessment and approvals process for nationally protected matters.

The Inquiry into Hydraulic Fracturing and the Potential Impacts on the Environment recommended that the NT Environment Assessment Act be reviewed in concert with the creation of a robust regulatory system for hydraulic fracturing.

In the light of these developments, the NT Government requested advice on restructuring the environmental assessment and approvals processes to ensure:

- their cost-effective, transparent and efficient implementation;
- the requirements necessary for implementation of the Commonwealth's 'one-stop-shop' are catered for;
- structural and administrative efficiencies are maximised; and
- appropriate environmental standards are delivered with reduced regulatory timeframes, duplication and uncertainty.

This Report provides the basis for that restructuring.

I am particularly indebted to Mark Flanigan for his research, insights and drafting of the Report and to Nerida Bradley of the NT public service who also provided invaluable assistance during the course of this work.

Yours sincerely



Allan Hawke AC
1 May 2015

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Executive Summary

Introduction

Improving the way in which environmental assessment and approval systems operate is the subject of significant policy attention in Australian jurisdictions.

The Northern Territory (NT) *Inquiry into Hydraulic Fracturing and the Potential Impacts on the Environment* recommended that the *NT Environment Assessment Act* (and by extension, its implementation) be reviewed in concert with creating a robust regulatory system for hydraulic fracturing. The Report of that Inquiry may be accessed at www.hydraulicfracturinginquiry.nt.gov.au

The environmental approvals system is an important element in building community confidence that the regulatory system will ensure development in the NT is safe and subject to appropriate independent oversight.

In December 2013, the Council of Australian Governments (COAG) recommitted to reform environmental assessment and approval systems.

Accordingly, the Australian Government committed to delivering a 'one-stop-shop' for environmental approvals that will accredit State/Territory regulatory systems under national environmental law to create a single environmental assessment and approval process. The one-stop-shop policy aims to:

“... simplify the approvals process for businesses, lead to swifter decisions and improve Australia’s investment climate, while maintaining high environmental standards.”

In the light of these developments, the NT Government requested advice on restructuring the environmental assessment and approvals processes to ensure:

- their cost-effective, transparent and efficient implementation;
- the requirements necessary for implementation of the Commonwealth’s ‘one-stop-shop’ are catered for;
- structural and administrative efficiencies are maximised; and
- appropriate environmental standards are delivered with reduced regulatory timeframes, duplication and uncertainty.

This builds on the NT Government’s earlier work to improve the environmental assessment and approval system through establishment of the independent Environment Protection Authority (EPA).

The NT EPA believes that the *Environment Assessment Act* (EA Act) and the *Environment Assessment Administrative Procedures* (EAAP):

“... can be generally regarded as antiquated, often ineffective and inefficient. The legislation is often ambiguous, leading to difficulties in its administration.”

A critical element in modern regulatory systems is trust. The community wants the environmental approvals system to safeguard environmental values while developers need certainty, predictability and timely decisions.

Recent OECD work indicates that well-designed environmental regulation that is rigorous, but flexible and outcomes focused can stimulate innovation.¹

¹ OECD Economics Department Working Paper 2014: “Do Environmental Policies Matter for Productivity Growth?”

Good Practice Principles

This Report is based on the following good practice principles.

Certainty

Assessment and approval processes must be clear and predictable for all stakeholders, developers, the community and Government alike.

Responsive

Having regard to certainty, it is important that the project environmental assessment and approvals system is capable of being responsive to changing circumstances and knowledge.

Efficiency

The system should be as efficient as possible in utilising scarce public and private resources, including time and people.

Outcomes and Risk Focused

The approval system should focus on the environmental outcomes being sought and the regulatory approach should be modulated to the risk associated with any particular activity while facilitating innovation and adaptation.

Reward Good Practice

Not all project proponents are equal. Where proponents have a track record of reliability and high performance, the environmental approvals system should recognise and reward that.

Trusted by Community and Proponents

Best practice regulatory systems engender and build trust that regulators and developers can balance development pressures and environmental outcomes. In the absence of trust, systems become increasingly bound up in time consuming prescriptive regulation and procedures.

Restructuring the Process

Assessment against Good Practice Principles

Broad concerns with the existing process can be summarised as follows:

- **Uncertainty:** roles in relation to environmental assessments and approvals which lack clarity, particularly the relationship between the EPA, other departments and the relevant Minister(s). In many circumstances, it is not clear who should be doing what.
- **Capacity Constraints:** approvals legislation used by existing 'sectoral one-stop-shops' is inadequate to permit appropriate environmental conditions on projects.
- **Inconsistency and Inequity:** agencies approach the setting of conditions differently, applying different treatments to environmental impacts.
- **Lack of Transparency:** in how environmental conditions are set following delivery of the EPA's Assessment Report.
- **Ambiguity:** it can be unclear whether there is a decision maker responsible for approving projects or actions.
- **Sectoral Capture:** there is a perception that agencies responsible for promoting a sector will not act with sufficient robustness or rigour in relation to managing the sector's environmental behaviour because they are 'captured' by their sectoral stakeholders.
- **Compliance:** concerns about ensuring compliance with the process and any environmental conditions.

Reform Options

Three options emerge for consideration by the NT Government 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; or
- Option 2** - create a single environment approval process with the Environment Minister as decision maker; or
- Option 3** - strengthen the sectoral 'one-stop-shop'² model, supported by enhanced transparency and independent performance monitoring.

Creation of a single environmental authorisation would have benefits in terms of clarity of process and responsibilities. It also provides a direct means of ensuring that the Commonwealth Approvals Bilateral Agreement requirements are met. 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.

The Review concludes that the best model for the NT circumstances is Option 3. This model 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; and
- enhancing environmental standards, while delivering reduced regulatory timeframes, duplication and uncertainty.

Adopting Option 3 now would not prevent moving to a regime like that set out in Option 2 at a later time.

Irrespective of which option is chosen, changes will be required to strengthen the system's operations, build community confidence and improve decision making efficiency.

Adoption of Option 3 in conjunction with delivery of improvements recommended by this report provides the opportunity for the NT Government to create a modern and robust environmental regulatory regime at the forefront of best practice.

Establish an Accountable Environmental Approvals System

Recommendation 1

That the NT Government strengthen integrated assessment and approvals processes, as follows:

- establish criteria, performance standards and benchmarks for all approvals containing environmental conditions. These are the standards against which sectoral approval processes can be accredited.
- consider the following as a necessary starting point:
 - o the authorising legislation provides for environmental issues to be considered;
 - o the legislation permits the application and enforcement of environmental conditions;
 - o the legislation permits consideration of ESD principles in decision making;
 - o the agency has access to adequate skills and expertise;
 - o there is public consultation and a positive framework for proponents to build community confidence;
 - o decision making processes and reasons are transparent; and
 - o there is a formal compliance and enforcement policy that includes graduated compliance responses and penalties, regular compliance reporting, compliance auditing and the capacity for directed compliance investigations;
- establish the Environment Minister as the decision maker for projects not subject to approval by an accredited approval process;
- accreditation should be issued by the Environment Minister following consultation with, among others, relevant colleagues and the EPA;
- where there is an EPA Environmental Assessment Report and/or advice, require responsible decision makers to publish a statement setting out how those recommendations are reflected in specific approval conditions;
- reinforce the existing requirements for publishing Statements of Reasons in circumstances where EPA recommendations are not implemented;

² A 'sectoral one-stop-shop' refers to project authorisation based on approvals issued under various legislative instruments which are brought together under a primary sectoral approval.

- require proponents to report annually and publicly on compliance with environment-related conditions of approval; and
- require the NT EPA to undertake regular assurance monitoring and reporting on the operation of the system to the Environment Minister.

Major Projects Facilitation

Recommendation 2

Formalise the process for major projects facilitation through:

- unambiguous criteria for granting major project status;
- recognising that major project facilitation is intended to reduce transaction costs for proponents, not to supplant the decision making process;
- establishing a clear oversight process for coordination of various decisions, particularly where a project requires multiple decisions from multiple line Ministers or their delegates; and
- reporting arrangements to the Government on major projects progress.

A Robust Best Practice System

EPA Operations and the Assessment Process

Recommendation 3

The EPA's role should be enhanced and focused to:

- provide independent evaluation of the impact of projects and recommend risk-based and outcome-focused environmental approval conditions. Recommendations to decision makers by the NT EPA to manage environmental risk must be expressed in clear terms with performance statements that can be monitored effectively;
- ensure that the Environmental Impact Assessment (EIA) process is consistent with ESD principles;
- undertake assurance monitoring and reporting of the environmental approvals system, within a formal assurance monitoring framework and policy set by government;
- on request of the Minister, provide advice on issues affecting the NT's capacity to manage emerging environmental issues and actions necessary to enhance community and business confidence in the environment protection regime; and
- provide independent advice to the Minister on the operation of the bilateral agreements with the Commonwealth Government under the *Environmental Protection and Biodiversity Conservation Act*.

Completeness and Equity - the Need to Cover the Field

Recommendation 4

Create an enforceable 'call-in' power for actions that are likely to have a significant environmental impact and have not been referred by a proponent or responsible entity. The 'call-in' regime should:

- be a discretionary decision of the Environment Minister acting on EPA and/or departmental advice;
- enable the Environment Minister to issue a time-limited stop work order for any action likely to have a significant environmental impact that has not undergone environmental assessment and approval;
- enable the Environment Minister to impose, subject to natural justice, enforceable conditions on a project in the event that a proponent does not submit a Notice of Intent (NoI) in response to a call-in; and
- create an offence of substantially commencing without prior authorisation a project that is subject to an assessment process.

Create a Tiered Risk-Based Environmental Assessment System

Recommendation 5

Streamline the EIA process by creating a tiered assessment system that is responsive to the degree of environmental risk associated with particular developments, the capacity to manage the risks, and the performance of the proponent which would:

- remove the existing Public Environment Report (PER) process and make the EIA process more flexible, with the capacity to select timeframes for assessment that reflect the environmental risks associated with a project;
- simplify EIA guidelines to focus on risk assessment and adaptive management responses rather than comprehensive descriptions of the environment;

- formalise assessment by Nol and enable the EPA to recommend environmental conditions at the Nol phase where the activity is well understood and the receiving environment is not particularly sensitive. As far as practicable, these conditions should be standardised;
- enhance the Nol phase to encourage proponents to bring forward risk-based outcomes-focused arrangements that incorporate performance-based adaptive management practices;
- reward good practice based on 'earned trust' so that proponents who produce high-quality documentation and management plans and build community trust are rewarded with a lighter assessment touch while those with poor documentation or practice are subjected to greater prescription;
- when seeking advice from Government agencies on an Nol, the EPA should concurrently circulate a draft decision for comment including potential conditions; and
- failure to comment in the prescribed time should be regarded as concurrence with the recommendations.

When to Refer?

Recommendation 6

Create a clear trigger in the EA Act and the EAAPs setting out the circumstances in which a Nol (or a referral) is to be submitted to the EPA for consideration as to whether environmental assessment and approval is required. The trigger should require referral when:

- a proponent intends to undertake an action (or series of actions); and
- it is reasonable to conclude that the action(s) is likely to have a significant environmental impact; and/or
- there is likely to be a significant impact on a Matter of National Environmental Significance.

Recommendation 7

Clarify the referral process to make it clear that a proponent has the responsibility to either:

- submit a Nol for their project to the EPA themselves if there is likely to be a significant environmental impact; or
- ensure that the relevant sectoral decision-making agency has referred the action to the EPA.

EIA Adequacy Tests and Currency

Recommendation 8

The EPA should be empowered to publish an 'adequacy score card' concurrently with a proponent's EIA documentation. This scorecard:

- should focus on the adequacy of the environmental risk assessments and the sufficiency or completeness of the performance-based management arrangements proposed; and
- a draft of the scorecard should be provided to the proponent ahead of publication and the proponent given the opportunity to correct their documentation.

Consideration should be given to using peer review to outsource preparation of the adequacy scorecard. If 'Supplementary Reports' are required to correct information deficiencies then these Reports should be subject to public disclosure prior to the EPA proceeding to finalise recommendations.

Recommendation 9

The Terms of Reference for EIAs and the subsequent Assessment Reports should be issued with clear statements about the length of time for which they will be valid. The length of time should be based on the likelihood of significant change to material environmental concerns.

Building Trust and Confidence

Recommendation 10

Enhance trust and confidence in the effectiveness of the sectoral 'one-stop-shop' environmental assessment process by;

- requiring responsible decision makers to report publicly on how they have put EPA recommendations into project approval conditions; and
- requiring proponents to report annually and publicly on compliance with environment-related conditions of approval.

Recommendation 11

Charge the NT EPA with assurance monitoring and reporting on the operation of the system. This monitoring should have a performance improvement orientation, as opposed to a compliance orientation, and should focus on:

- the integrity of the assessment system - in particular whether systems are in place and operating effectively - to ensure that actions requiring assessment or approval are being appropriately identified and assessed;
- the effectiveness of the sectoral 'one-stop-shops', including compliance with transparency and reporting commitments;
- the operation of risk management arrangements within the assessment and approval system to ensure that they are robust, well-modulated and used to achieve ESD outcomes;
- the extent to which the system is delivering risk-based, adaptive and outcomes-focused decisions;
- the operation of relevant quality assurance arrangements;
- the extent to which proponents are demonstrably building community confidence;
- the compliance of proponents with disclosure and environmental performance reporting obligations; and
- the effectiveness of compliance and enforcement monitoring and reporting.

Environmental Policy Development

Recommendation 12

The overall capacity, capability and robustness of the NT environmental management system will be enhanced if there is a clear separation between the role of independent environmental assessment and provision of advice to Government on environmental policy. This can be achieved by:

- ensuring that environmental policy development, including the development of guidelines, compliance and enforcement policies, is performed within the Department of Lands, Planning and the Environment under the direction of the responsible Minister; and
- as with other respected independent statutory bodies, the EPA's back office support, including professional and technical expertise and administrative services, will continue to be provided by the line Department.

Recommendation 13

The Government should consider modernising the approach to managing the impacts on threatened species currently set out under the *Territory Parks and Wildlife Conservation Act*. This would include consolidating the threatened species management functions.

Environmental Offsets

Recommendation 14

The NT should develop an environmental offsets policy as a priority, based on the 'avoid, mitigate, offset philosophy.' In the interim, the NT Government could adopt the Commonwealth Offsets Policy.

An NT-specific offsets policy should consider the conservation value of large scale threat reduction such as fire, feral animal and cat management in offsetting the residual impact on native flora and fauna, and protected species. In this context, large scale land management undertaken by indigenous land holders and ranger groups has an important role to play in offsetting the ecological impact of localised development.

Land Development and Strategic Planning

Recommendation 15

Strengthen long-term strategic land use planning so that environmental considerations and constraints - including threatened species impacts - are considered when strategic land use decisions are being made. This could be done at the time of formulating strategic area plans and/or planning scheme amendments. The resultant plans and policies should promote ESD of future urban land.

Strategic Planning documents should clearly set out the environmental constraints associated with the planning area, level of environmental risks associated with the development concept, and establish a set of outcome performance criteria to be met by individual developments under the plan.

In order to comply with the proposed Approvals Bilateral (cl 8.2) the NT Government should work towards ensuring that all environmental information is discoverable, accessible and re-usable by the community, proponents and other Government agencies.

Recommendation 16

The *Planning Act* should be amended to:

- require strategic planning to, as far as possible, establish outcome-based environmental performance standards that will apply to subsequent developments. The standards should cover management of at least the potential significant impacts on matters of National Environmental Significance, NT threatened species and communities, water resources, natural environments and habitats. Standards could also include management of construction impacts such as noise and dust;
- require consultation with the EPA during the strategic planning process on the environmental risk assessment and performance standards. Moreover, the Government may also wish to require the EPA to make recommendations to the Minister whether the plan:
 - has considered all relevant environmental risks;
 - has factored these risks into the final design appropriately;
 - and that, if implemented, the scheme is not likely to jeopardise continued functioning of important ecosystems; and
 - that the outcomes will not be inconsistent with ESD;
- require assessment of environmental risks at the zoning stage of development with the aim of ensuring that subsequent development is ecologically sustainable. The assessment and associated ESD decision should be published along with the zoning decision; and
- exempt land development from further need for environmental impact assessment by the EPA in circumstances where the environmental risks have been assessed during the zoning.

Recommendation 17

Outside the areas subject to planning controls, the Department of Lands, Planning and the Environment, in consultation with the EPA, the Department of Mines and Energy and the Department of Land Resource Management, should undertake high-level bioregional strategic environmental assessments. The purpose of such assessments should be to facilitate strategic environmental risk analysis and establish the environmental performance guidelines that subsequent development projects in these regions would need to meet.

Integrated Approval for Minerals Developments

Recommendation 18

Test and accredit the integrated approval process under the *Mining Management Act* whereby the Minister for Mines and Energy grants project and environmental approval to mine developments against the criteria established under Recommendation 1, subject to:

- consultations between the Department of Mines and Energy and the EPA to ensure that the guidelines for preparation of the environmental component of Mining Management Plans are fit for purpose;
- establishing as a performance standard for Mining Management Plans that “adverse effects on the environment are managed to reduce environmental damage to as low as reasonably practicable ;”
- guidance for the preparation of Mining Management Plans to ensure that they are risk-based and outcome-focused. Actions to manage environmental risk must be expressed in clear terms with performance statements that can be monitored effectively;
- increase transparency and confidence in the process by providing public Statements of Reasons for key decisions including:
 - the decision to, or not to, refer Mining Management Plans to the EPA; and
 - the judgement about the acceptability of the environmental controls in Mining Management Plans;
- the likelihood that the anticipated residual environmental impact is as low as reasonably practicable;

- publication of the environmental impact management sections of Mining Management Plans. Commercial-in-confidence exemptions should be strictly limited;
- publication of annual mine environmental management performance reports prepared by proponents; and
- development of a compliance reporting strategy that facilitates appropriate publication of compliance audits.

Recommendation 19

Streamline the requirements for Mining Management Plans and Environmental Mining Reports so that they can be used as the Nol under the *EPA Act*. This will remove the considerable duplication currently undertaken in preparing multiple documents covering essentially the same issues.

Recommendation 20

Grant approval to Mining Management Plans for periods related to the scale of environmental risks and the likely effectiveness of proposed management interventions. These approvals should be granted for periods of up to five years, subject to annual performance reporting, to reduce transaction costs for industry and approval agencies without increasing environmental risk.

Mine Site Water and Waste Management

Recommendation 21

Consider amending the *Waste Management and Pollution Act* and the *Water Act* to create a single regulatory regime for management of mine site water, waste and pollution both on and off-site. Responsibility for administering this arrangement might be delegated to the Department of Mines and Energy under appropriate monitoring and reporting arrangements when the Acts are triggered by mine-related activities.

Lawful Considerations

Recommendation 22

Ensure that all primary decision-making legislation used to authorise projects and developments provides for the decision maker to:

- consider environmental issues, including relevant international obligations, national policies, guidelines and plans;
- consider cross-border issues;
- implement, *via* conditions, any advice of the NT EPA;
- impose risk-based environmental conditions, including offsets and requirements for management plans;
- require public reporting of performance monitoring; and
- enforce conditions.

CHAPTER 1

Introduction

Improving the way in which environmental assessment and approval systems operate is the subject of significant policy attention in Australian jurisdictions.

The recent Northern Territory (NT) *Inquiry into Hydraulic Fracturing and the Potential Impacts on the Environment* recommended that the *NT Environment Assessment Act* (and by extension, its implementation) be reviewed in concert with creating a robust regulatory system for hydraulic fracturing. The report of that Inquiry may be accessed at www.hydraulicfracturinginquiry.nt.gov.au

Taking a close look at the operation of the environmental regulatory system is an important element of building community confidence that the regulatory system is capable of ensuring development in the NT is safe for the environment and subject to appropriate independent oversight.

From a business point of view, a catalyst for reform arose from Business Council of Australia's concerns that environmental assessment and approvals processes, particularly those involving the Commonwealth under the *Environment Protection and Biodiversity Conservation Act*, had become inefficient and were acting as a disincentive to major development.

In December 2013, the Council of Australian Governments (COAG) recommitted to reform of environmental assessment and approval systems.

Accordingly, the Australian Government committed to delivering a 'one stop shop' for environmental approvals designed to accredit State/Territory planning systems under national environmental law through a single environmental assessment and approval process. The 'one-stop-shop' policy aims to:

“... simplify the approvals process for businesses, lead to swifter decisions and improve Australia's investment climate, while maintaining high environmental standards.”

Achieving this, involves a three-stage process for each jurisdiction, comprising:

- signing a Memorandum of Understanding;
- entering into an Assessment Bilateral Agreement; and
- negotiating an Approval Bilateral Agreement.

The COAG and Commonwealth commitment to reform that maintains environmental standards is reflected in the *Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (Standards for Accreditation). These standards have been developed to inform development of the Approvals Bilateral Agreements.

The Commonwealth considers the Standards for Accreditation part of a framework, with a series of checks and balances, to ensure that the bilateral agreements are implemented effectively and deliver the intended outcomes.

In the light of these developments, the NT Government requested advice on restructuring the environmental assessment and approvals processes, to ensure:

- their cost-effective, transparent and efficient implementation;
- the requirements necessary for implementation of the Commonwealth's 'one-stop-shop' are catered for;
- structural and administrative efficiencies are maximised; and
- appropriate environmental standards are delivered with reduced regulatory timeframes, duplication and uncertainty.

The two types of bilateral agreement under the Commonwealth legislation are:

- an Assessment Bilateral Agreement that declares that actions assessed in a specified manner by a State/Territory need not be assessed under the *EPBC Act*, thus minimising duplication between Commonwealth and State/Territory assessments; and
- an Approval Bilateral Agreement that declares that actions taken under accredited State/Territory management arrangements or authorisation processes do not need further Commonwealth approval under the *EPBC Act*.

In general terms, an agreed Assessment Bilateral Agreement is a pre-condition to negotiation of an Approvals Bilateral Agreement. The NT and Commonwealth Governments entered into an Assessment Bilateral Agreement in December 2014.

The commitments inherent in the Assessment Bilateral Agreement are for the NT Government to:

- assess environmental impacts to the greatest extent practicable;
- determine an assessment approach that will allow the Commonwealth Environment Minister to have sufficient information to make an informed decision about whether or not to approve an action;
- issue a statement of NT requirements and conditions that may be recommended to apply to the development;
- develop outcome-focused recommendations in the Assessment Report;
- ensure proponents take reasonable steps to obtain the views of affected and interested stakeholders; and
- participate in consultation on, and monitoring of, authorisation conditions.

Failure to deliver on the letter and spirit of these Assessment Bilateral undertakings would undermine the confidence necessary for the operation of a collaborative assessment system and would jeopardise the prospect of progressing to an Approvals Bilateral Agreement. The implication of these requirements needs, of course, to be factored into the future arrangements governing NT environmental assessment arrangements.

Considerations for negotiating an Approvals Bilateral Agreement are set out in the Standards for Accreditation.

These Standards derive from key legal requirements for accreditation imposed on the Commonwealth under the *EPBC Act*. The Commonwealth is, to the extent possible, seeking a flexible, outcomes approach to negotiating the Agreements. This means that each jurisdiction may propose for accreditation, a set of arrangements that combine legislative provisions with plans, policies and programs.

The high-level outcomes being sought by the Commonwealth for Approvals Bilateral Agreements are:

- Matters of National Environmental Significance are protected and conserved;
- delivery of certainty and efficiency by systematically identifying actions that are likely to have a significant impact on a Matter of National Environmental Significance;
- delivery of efficiency and transparency by employing assessment approaches that reflect the risk of the proposed action and provide sufficient information for a decision maker to make an informed decision;
- delivery of certainty, transparency and legally robust decisions through environmental assessments that adequately address all Matters of National Environmental Significance;
- approval decisions being based on environmental policy principles set out in the 1992 Intergovernmental Agreement on the Environment;
- systems are transparent and offer appropriate opportunities for public engagement;
- decisions are legally robust; and
- bilateral agreements must include assurance mechanisms so that Governments and the community will know that the standards for accreditation, together with environmental outcomes, are maintained.

The NT Government's ***Framing the Future*** sets out the policy objectives which it wants to underpin service delivery and maximise new opportunities within the Territory, Northern Australia and Asia. ***Framing the Future*** is also intended to guide Government decision-making and be a tool for Ministers and Government agencies to ensure work is focused on what is important to Territorians

CHAPTER 1

Introduction cont.

One of the four strategic goals set out in the policy is a 'balanced environment' i.e. an environment that is sustainable, balances use with protection and is well managed, including urban design and public spaces. This objective is aimed at maximising economic opportunities while ensuring decision-making processes provide appropriate mitigation of environmental impacts.

The NT Government priority to reducing regulatory burden includes establishment of the Construction and Development Advisory Council, with a mandate to help create a competitive business environment for the construction and development sector by investigating opportunities to, among other things:

- increase regulatory certainty, including clarity of regulatory requirements and agencies' administrative requirements; and
- improve the timeliness of Government regulatory and administrative processes.

Further, improvement in the arrangements governing NT environmental approvals will need to build on the work already undertaken by the Government to strengthen environmental assessments and approvals. Creation of an independent EPA was an NT Government election commitment.

Context

Information gathering for this Report included submissions from relevant Government agencies including the NT EPA, a series of detailed briefings and demonstrations of decision-making processes for the:

- NT EPA;
- land planning and development approvals process;
- NT land information system; and
- mining exploration and development approval processes.

Detailed briefings and interviews were held with the Deloitte 'Red Tape Abolition Squad' and senior officials from the:

- NT EPA (including the Chairman);
- Department of Lands, Planning and the Environment;
- Department of Mines and Energy;
- Department of Primary Industries and Fisheries; and
- Department of Land Resource Management.

These briefings and 'run throughs' provided important insights into the practical operation of the NT system.

A series of examinations into aspects of the environmental regulatory system have been undertaken in the NT. The most significant of these was the 2009 Review of the Act conducted by the previous EPA. Submissions and meeting reports associated with that exercise have been examined as part of this Report.

Existing Environmental Approvals Legislation Framework

Environmental Assessment Act

The *Environmental Assessment Act* is supported by Environmental Assessment Administrative Procedures. Together, the Act and Procedures provide the framework for assessing 'proposed actions' that may have a significant impact on the environment.

Environment is broadly defined to mean "all aspects of the surroundings of man including the physical, biological, economic, cultural and social aspects." 'Proposed action' is broadly defined to mean:

- (a) the formulation of proposals;
- (b) the carrying out of works and other projects;
- (c) the negotiation, operation and enforcement of agreements and arrangements (including agreements and arrangements with, and with authorities of, the Commonwealth, the States and other Territories);
- (d) the making of, or the participation in the making of, decisions and recommendations; and
- (e) the incurring of expenditure by, or on behalf of, a person, either alone or in association with another person.

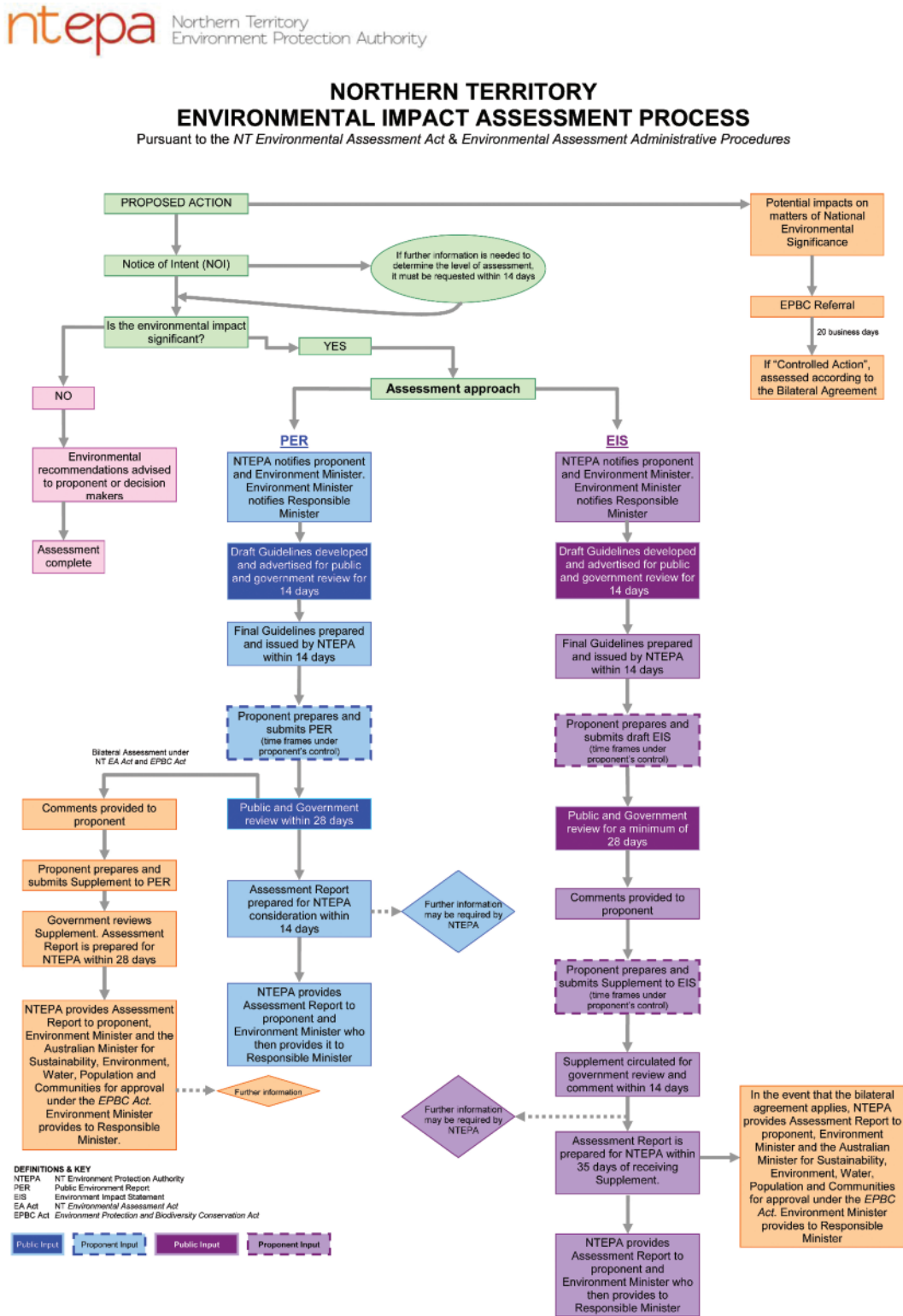
This very wide definition of an 'action' itself creates considerable uncertainty.

The definition's breadth is partially limited by the requirement that only matters which could reasonably be considered as capable of having a significant effect on the environment should be fully examined and taken into account in considering a proposed action. This formulation's threshold means that in practice there is no mechanism in the NT for considering environmental impacts of proposals that have an impact that may be material, but less than significant.

The Act and Procedures commenced in 1984 and have not been subject to significant amendment since that time. The Procedures were amended in 2003 as an outcome of negotiations between the NT and Australian Governments for the establishment of an earlier bilateral agreement for environmental assessments under the *EPBC Act*.

Existing Environmental Approvals Legislation Framework cont.

Figure 1: Northern Territory Environmental Impact Assessment Process



In 2009, the former EPA conducted an extensive review of the NT's environmental assessment process. The 21 submissions from Government, business and community stakeholders indicated wide ranging support for improving the enforceability of environmental assessment outcomes.

Primary concerns with the environmental assessment process raised by those submissions (which are just as relevant today) can be summarised as follows:

- no approval required - in certain instances, where it is difficult to determine who the responsible Minister is, there are ambiguities about how projects should be assessed. The NT EPA's position is that where no 'primary' authorisation is required, the NT EPA cannot assess such a project;
- no clear requirement to account for environmental matters when making decisions - depending on the approving legislation, there may not be a clear requirement for decision makers to account for environmental matters;
- uncertainty as to:
 - a. whether environmental assessment is required;
 - b. whether the NT EPA is able to assess projects;
 - c. how to account for assessment report recommendations in approvals;
 - d. whether assessment report recommendations have been included in approvals;
 - e. whether environmental conditions are being complied with; and
 - f. if environmental conditions are not complied with, how they will be enforced; and
- lack of coordination and delay in understanding what approvals are required.

Northern Territory Environment Protection Authority Act

The *NT EPA Act* commenced in January 2013. The Act establishes the NT EPA as the authority responsible for undertaking functions associated with environmental assessments and the management of waste and pollution. The NT EPA is identified as the administering authority under the *Environmental Assessment Act*, *Waste Management and Pollution Control Act* and the *Environment Protection (Beverage Containers and Plastic Bags) Act*.

The NT EPA is also tasked with promoting ecologically sustainable development and providing advice to the Minister on a range of matters related to the environment.

Waste Management and Pollution Control (WMPC) Act

The *Waste Management and Pollution Control Act* commenced in 1999. The WMPC Act is designed to protect the environment through encouragement of effective waste management and pollution prevention and control practices.

The WMPC Act does not apply to any wastes or pollutants that are generated through mining or petroleum activities provided those wastes and pollutants are confined within the area of a mining or petroleum lease. It also does not apply in any circumstance where the *Marine Pollution Act* applies.

The environment includes soil, air and water.

Existing Environmental Approvals Legislation Framework cont.

For most business, the Act applies through its imposition of a general duty on those who conduct an activity, or perform an action, that causes or is likely to cause pollution resulting in environmental harm or that generates, or is likely to generate, waste to minimise the impacts of the activity. A limited number of activities must hold an approval or licence before a person may conduct them in the NT. In general terms these are:

- activities associated with constructing landfills;
- activities associated with operating landfills servicing more than 1000 people;
- activities associated with constructing and operating facilities associated with transporting, storing, collecting, recycling and managing certain wastes, other than waste from sewerage plants;
- activities associated with transporting, storing, collecting, recycling and managing certain wastes, other than waste from sewerage plants; and
- activities associated with constructing and operating liquefied natural gas (LNG) facilities, including constructing and operating the onshore gas plant as part of the Blacktip Gas Project.

Water Act

The *Water Act*, introduced in 1992, is designed to manage the NT's surface and ground water resources. The Act provides for the investigation, allocation, use, control, protection and management of water resources.

Similar to the WMPC Act, mining and petroleum-related activities are exempt from a number of provisions of the *Water Act*.

Discharges of pollutants or waste to water are managed through waste discharge licences which are required for mining and petroleum activities if the discharge is not confined to the land on which the activity is taking place.

Other key approvals legislation includes;

- the *Mining Management Act*;
- the *Planning Act*; and
- the *Territory Parks and Wildlife Conservation Act*.

Good Practice Principles

The existing environmental assessment and approvals system in the NT has evolved since 1982 when, as part of the move to strengthen the case for self-Government, the NT established its own legislation and stopped operating under the Commonwealth environmental assessment legislation.

Future changes in the system or its operation should, of course, be guided by principles of regulatory best practice.

The OECD's *Best Practice Principles for the Governance of Regulators* reflects the experience of member and non-member countries. The principles, among other things, identify the following elements of good practice:

- role clarity;
- preventing undue influence and maintaining trust;
- decision-making and governing body structure for independent regulators;
- accountability and transparency; and
- performance evaluation.

Effective regulatory administration supports achievement of Government policy objectives while minimising the burden and compliance cost for regulated entities. Well-functioning systems have a clear understanding of the regulatory outcomes being sought, apply a risk-based approach to regulatory administration, engage effectively with stakeholders to share and collect information, use information as a source of intelligence to guide regulatory activity, are transparent in their approach, accountable for their actions and decisions, and monitor and report on their performance and the effectiveness of the regulatory regime.³

Accordingly, this Report has drawn on the following good practice principles when framing its recommendations.

³ Australian National Audit Office 2014: "*Administering Regulation: Achieving the Right Balance*."

Certainty

Assessment and approval processes must be clear and predictable for all stakeholders, developers, community and government alike. The system must deliver outcomes in the form of project approvals that proponents and the community can have confidence in. The expectations of proponents throughout the consent process should be clear and not subject to the whim of regulators.

Responsive

Having regard to the certainty principle, a project environmental assessment and approvals system has to be capable of being responsive to changing circumstances and knowledge. Those administering the system must also be responsive and adaptable. Experience suggests that systems that rely heavily on codifying all potential scenarios quickly become tied up in 'red tape.'

Just as all projects are different and are likely to encounter different environmental situations, so to, a one-size-fits-all approach to administration of the environmental impact assessment system is not likely to suit all circumstances - flexibility in the choice of approaches, matched to the risks associated with particular projects, will result in better regulatory outcomes.

The risk inherent in flexible and responsive systems is that they could be abused. It is therefore critical that judgements in exercising discretion are clear and defensible.

Within the constraint of ensuring that ecological processes are maintained, decisions that take into account ESD principles necessarily require trade-offs between economic benefits and environmental impacts - at least in the short term. The trade-offs require weighing different value judgements. Judgements underlying such decisions need to be transparent and reasonable. OECD work indicates that well-designed environmental regulation that is rigorous, but flexible and outcomes-focused can help stimulate innovation.⁴

Efficiency

The system should be efficient in utilising scarce public and private resources, including time and people.

It should also be fit for purpose and not be overly elaborate if it is to meet the needs of the Territory and its likely development pressures.

Outcomes and Risk Focused

Traditional environmental impact assessment focuses on gathering and sharing information as an input for decision making. This remains an important objective of the assessment and approval process, but increasingly the focus has shifted to identifying the appropriate conditions to attach to a development to ensure that the public interest in achieving ecologically sustainable development is achieved. In general, the approval system should focus on the outcomes being sought for the environment. The regulatory approach should also be modulated to the risk associated with any particular activity.

Outcomes-focused regulations and conditions are also beneficial in allowing flexibility and innovation in the way in which a risk is managed rather than ossifying a project by specifying the means of managing an issue.

⁴ OECD Economics Department Working Paper 2014: "Do Environmental Policies Matter for Productivity Growth?"

Existing Environmental Approvals Legislation Framework cont.

Reward Good Practice

Not all project proponents are equal. Some proponents have a track record of reliability and high performance. The environmental approvals system should reward those with a good track record with a lighter regulatory touch. This is an extension of the risk-based approach to regulation, championed by the Australian National Audit Office (ANAO):

“Adopting a risk-based approach to regulatory administration can have benefits for both regulated entities and regulators. Compliance costs for regulated entities can be minimised with entities assessed as lower risk being subject to a lighter touch compliance approach without unnecessary intrusion by regulators. On the other hand, higher risk entities may be subject to more scrutiny by a regulator and incur additional compliance costs which are offset by improved regulatory outcomes and benefits for the community.”

An extension of this principle is that the proponent, not the NT, should carry the risk of non-performance. This is particularly so where documentation provided by a proponent is inadequate for confident, transparent decision making.

Trusted by Community and Proponents

Best practice regulatory systems engender and build trust. In the absence of trust, systems become increasingly bound up in time consuming prescriptive regulation and procedure. Significant delays to projects can flow from the need to devote more time to managing community mistrust and resulting legal uncertainty. One of the key mechanisms used to build trust in regulatory systems is transparency and openness - particularly in the use of discretion. Transparency is required of decision makers and project operators alike.

Restructuring the Process

This chapter of the Report sets out the findings on restructuring the environmental assessment and approvals processes, to ensure:

- cost-effective, transparent and efficient implementation;
- the requirements necessary for implementation of the Commonwealth's 'one-stop-shop' are catered for;
- structural and administrative efficiencies are maximised; and
- appropriate environmental standards are delivered with reduced regulatory timeframes, duplication and uncertainty.

Necessary precursors to success in achieving these goals involve demonstrating assurance that the system is operating well and ensuring adequate engagement with the community.

The first two recommendations deal with the high-level issues associated with the need to have clear responsibility for the setting and monitoring of environmental conditions. Clear lines of responsibility and accountability are an important facet of providing certainty. This is also expected to be a key performance criterion for any approval bilateral with the Commonwealth Government. The remainder of the recommendations detail necessary changes to support an effective and efficient environmental approvals system.

Establish an Accountable Environmental Approvals System

The NT environmental assessment and approvals system is modelled on the original system implemented by the Commonwealth prior to introduction of the *Environmental Protection and Biodiversity Conservation Act* in 1999. As such, it is based on a system where at the conclusion of the EIA process, the EPA makes recommendations to whichever Minister is responsible for approving the development or activity.

This can be characterised as a 'one-stop-shop'(OSS) or 'sectoral one-stop-shop' (SOSS) model where the sectoral Minister responsible for approving a project is responsible for all aspects of the authorisation, including environmental conditions, if any. Significantly, the final judgement of whether to apply environmental conditions rests with the responsible Minister, **not** the EPA or the Environment Minister.

⁵ It should be noted that this 15% figure arises from the EPA's view that it can only act in relation to 'primary' authorisations. Neither the figure nor the assertion that the EPA can't act has been tested here.

There is a reality gap between the aspiration and the reality of a 'sectoral one-stop-shop'. While the current NT system is a form of 'sectoral one-stop-shop', it should be recognised that rarely does a sectoral Minister give **all** regulatory approvals for a project. It is common for a wide range of secondary approvals to be issued by other regulatory bodies and Ministers.

Broad concerns with the existing processes can be summarised as follows:

- **Uncertainty:** environmental assessments and approvals roles lack clarity. There is uncertainty regarding the relationship between the EPA, other departments and the relevant Minister(s). In many circumstances, it is not clear who should be doing what;
- **Capacity Constraints:** approvals legislation used by existing 'sectoral one-stop-shops' is inadequate to permit appropriate environmental conditions on projects;
- **Inconsistency and Inequity:** different agencies approach the setting of conditions differently, applying different treatments to environmental impacts;
- **Lack of Transparency:** in how environmental conditions are set following delivery of the EPA's assessment report;
- **Ambiguity:** it can be unclear whether there is a decision maker responsible for approving projects or actions. The EPA estimates that this is the case in relation to at least 15% of projects that have come before it;⁵
- **Sectoral Capture:** there is a perception that agencies responsible for promoting a sector will not act with sufficient robustness or rigour in relation to managing the environmental behaviour of the sector because they are 'captured' by their sectoral stakeholders; and
- **Compliance:** lack of confidence and uncertainty about the responsibility for ensuring compliance with the process and any environmental conditions.

Reform Options

Three options emerge for NT Government consideration with a view to clarifying the NT's environmental decision-making roles and ensuring that the environmental regulatory system is robust:

- Option 1** - retain the current system with incremental administrative improvements;
- Option 2** - create a single environment approval process with the Environment Minister as decision maker; or
- Option 3** - strengthen the 'sectoral one-stop-shop'⁶ model, supported by enhanced transparency and independent performance monitoring.

Irrespective of which option is chosen, changes to the system will be needed to strengthen its operation, build community confidence and improve decision making efficiency. These changes are addressed in this Report.

Option 1: Retain the Current System with Incremental Administrative Improvements

The current system for environmental assessments and approvals has developed over a long period of time to meet the needs of the NT community and Government. Like all systems of public administration, there is scope to improve the system's operations through incremental improvements to practices and procedures without legislative change.

Many incremental improvements would focus on a better articulation of the role of the different players in the system and better communications between the sectoral agencies and the EPA.

The NT Government has already made important changes that go a long way to improving transparency, including requirements for responsible Ministers to provide a Statement of Reasons to Parliament when they do not implement the EPA's Recommendation Report. Sectoral agencies are also taking steps to improve transparency of decision making. A good example is the Department of Mines and Energy's current work to improve transparency in the development and monitoring of Mining

Management Plans. These types of cultural and administrative changes will assist in improving community trust in the system while facilitating more efficient decision making for large developments.

While important, even critical, incremental changes to procedures, practices and culture necessarily take a long time to bear fruit and can in practice be difficult to maintain. There is also a risk that these types of changes will inadvertently reduce clarity in the operation of the system. 'Improved' internal consultation mechanisms often have unintended consequences such as diffusing responsibility for judgements and can add significantly to the time taken to arrive at a decision. Neither of these outcomes would contribute to improving certainty or efficiency in the system. This can be reduced somewhat by strong procedures and clear coordination, but bureaucratic processes alone cannot entirely remove the risk associated with such changes.

Importantly, relying on refining internal practices and procedures alone may not be sufficient to meet the Commonwealth's requirements in the draft Approvals Bilateral Agreement for a direct and transparent relationship to setting and enforcement of environmental conditions following an EIA.

⁶ A 'sectoral one-stop-shop' refers to project authorisation based on approvals issued under various legislative instruments which are brought together under a primary sectoral approval.

Option 2: Create a Single Environment Approval with the Environment Minister as Decision Maker

As mentioned, much of the current NT environmental impact assessment and approval system is modelled on the earlier Commonwealth legislation dating from 1974. Like the current NT system, the original Commonwealth legislation required the Environment Minister to make recommendations to the sectoral Minister responsible for the decision that had triggered the Environmental Impact Assessment process. In 1999, the Commonwealth remodelled its approach to environmental decision making establishing a regime under the *Environmental Protection and Biodiversity Conservation Act* where a separate environmental authorisation is granted by the Environment Minister. This authorisation is in addition to any approvals that are required to be made by other statutory decision makers.

Creation of a separate environmental authorisation vested in the Environment Minister would be the most direct means of addressing the need under the proposed Approvals Bilateral Agreement for a clear enforceable environmental approval decision.

Under this option, on completion of the Environmental Impact Assessment, the NT EPA would prepare an Assessment Report on the project and a draft decision including any conditions proposed to be imposed. Following appropriate consultation with the proponent, other agencies, and potentially the Commonwealth, this report together with recommended conditions would be provided to the Environment Minister. The Environment Minister would then issue their decision together with any conditions. The Department of Lands, Planning and the Environment would be responsible for monitoring and enforcing compliance with the Minister's decision and conditions. Sectoral approvals and authorisations would continue to be made in the existing way.

A 'stand-alone' environmental authorisation system would require a mechanism to determine which projects need to be subject to the new authorisation. Like the approval decision, this 'trigger' event should be under the authority of the Environment Minister, not the EPA or the sectoral Minister.

The ambiguity that arises from the current distinction between 'primary' and 'secondary' approvals would be removed by this

approach as it would become immaterial. The trigger test would be the degree of potential environmental impact regardless of who was involved or had to give concurrent approvals.

It would be the responsibility of the Environment Minister to bring a whole-of-Government perspective to their individual decision making - consulting when necessary with Cabinet colleagues in the usual way.

This approach would essentially mirror that of the Commonwealth and a number of States, including Western Australia.

Creation of a single environmental authorisation has clear benefits in terms of clarity of process and responsibilities. It is also the most direct means of ensuring that the Commonwealth Approvals Bilateral Agreement requirements are met. It may also have the added advantage of being regarded by the public to provide a robust environmental regulatory regime that is less prone to undue influence from sectoral interests.

Concerns that a specific environmental authorisation would in fact create an environmental veto, and therefore contribute to uncertainty, are probably overstated given that the decision is to be made by the Minister, not the EPA, in the context of facilitating ESD.

Creation of a separate environmental approval for developments would be a significant change to the Territory's project approval framework and would represent a marked shift in policy. 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.

Reform Options cont.

While increasing certainty, there would be increased risk of duplication. This would be particularly so for mining activities as the *Mining Management Act* places a legislative responsibility on miners and the Department of Mines and Energy to manage on-site environmental impacts.

Other issues with this option include:

- the risk of inconsistent conditions arising between different project authorisations;
- the appropriateness of the Environment Minister setting conditions about the social and economic impacts of projects (as is provided for by the current definition of the environment in the legislation); and
- the likelihood that this change would reinforce 'silo' and advocacy behaviours which are inconsistent with whole-of-Government decision making and the pursuit of ESD.

Option 3: Strengthen the Sectoral One-Stop-Shop Model Supported by Enhanced Independent Performance Monitoring

An alternative to the creation of the single environmental authorisation option is to strengthen existing 'sectoral one-stop-shop' (SOSS) arrangements. This would maximise the existing arrangements and be more cost effective for the Territory. It would have the added advantage of integrating all considerations relevant to a project approval into a single authorisation.

This is not a business-as-usual approach. Changes will be required to make the sectoral 'one-stop-shop' approach more effective and trusted and to meet the Commonwealth Approvals Bilateral requirements. The changes will also enhance the clarity of the system for proponents and the community.

of the system for proponents and the community.

Current weaknesses in the 'one-stop-shop' arrangements include:

- various administrative responsibilities associated with environmental issues are not clear;
- not all line agencies have the skills, capacity or legislation to impose or enforce environmental conditions recommended by the EPA;
- not all developments with a potential significant environmental impact are subject to an authorising decision;
- there is a lack of transparency in how the recommendations arising from EIAs are translated into project approval conditions;
- there is a lack of transparency around compliance and enforcement of environmental conditions; and
- there is no adequate system for monitoring and reporting on the performance and effectiveness of the system or operation of the SOSS.

One of the great strengths of a SOSS is that it can bring together a whole-of-Government or cradle-to-grave perspective on a project. Traditionally, the lead agency is most familiar with the sector and its unique challenges and responsible for primary authorisations (the Mines Department in the case of mine developments, the Fisheries Department for new fishery activities and the Agriculture Department for new dams etc.)

It can also be perceived as a major weakness in the eyes of the community. This community perception that sectoral agencies are captured by their sectors and are therefore less inclined to impose necessary environmental constraints on developments, or to monitor and enforce environmental conditions adequately, undermines the goal of establishing a robust regulatory system. As already discussed, building community trust in the efficacy of the system is critical to establishing a system that is timely and efficient. This is particularly important for resource developments such as mines and large infrastructure developments such as new dams and ports.

Negative perceptions associated with sectoral decision making can be addressed by first making decisions transparent so that the community can see the considerations involved in the decision making; and second, by establishing an independent assurance system to monitor performance of the sectoral decision making systems. The aim of assurance monitoring is to ensure the decision making system is operating as intended, not to review individual decisions.

Not all sectoral decision making arrangements are suitable to function as an SOSS. The current distinction made by the EPA of 'primary' and 'secondary' authorisations recognises this. Some agencies do not trigger enough projects or have the necessary skills to act as a 'one-stop-shop'. It is important to ensure that only those systems capable of performing to an acceptable standard are used as an SOSS. Accreditation of those regulatory systems suitable for performing the role of an SOSS would help the community to have faith that the agencies performing that function for the NT Government are up to the task of providing adequate environmental safeguards.

Basic criteria for accreditation of an SOSS would include:

- does the authorising legislation allow environmental issues to be considered fully;
- does the legislation permit the application and enforcement of environmental conditions;
- does the legislation permit consideration of ESD principles in decision making;
- does the agency have access to adequate skills and expertise;
- are decision making processes and reasons transparent;
- is there scope for public consultation and;
- is there a formal compliance and enforcement policy that includes graduated compliance responses and penalties, regular compliance reporting, random compliance auditing and the capacity for directed compliance investigations?

In circumstances where an agency has not been accredited or does not wish to be accredited, then environmental authorisations should be issued by the Environment Minister acting on advice of the NT EPA. This authorisation would sit alongside all other sectoral approvals required under a wide range of legislation, but would simplify the various environmental approvals, including impacts on threatened species.

The criteria by which the SOSSs are accredited should be agreed as a whole-of-Government measure. To ensure a high degree of efficacy, accreditation should be granted by the Environment Minister after seeking advice from a wide range of sources including, but not limited to, the sectoral agency, relevant colleagues, the EPA and the Department of Lands, Planning and the Environment.

In summary, current SOSS weaknesses can be addressed as follows:

- set performance standards and benchmarks against which sectoral integrated approval processes can be accredited. These benchmarks should cover the skills of the agency, its capacity to undertake and enforce an integrated approval and the capacity of its legislation to allow a wide range of whole-of-Government conditions to be imposed;
- require responsible decision makers to publish a statement setting out how EPA recommendations have been translated into specific approval conditions,
- reinforce requirements for publishing Statements of Reasons in circumstances where EPA Recommendation Reports are not implemented;
- establish the Environment Minister as decision maker for projects not subject to approval under an accredited approval process;
- require proponents to report annually and publicly on compliance with environment-related conditions of approval; and
- require the NT EPA to undertake regular assurance monitoring and reporting on the system's operations.

Reform Options cont.

Proponents also have a responsibility to build community confidence that environmental impacts will be acceptable and well managed. Building their social licence is strongly linked to establishing the 'earned trust' necessary for operation of a robust modern regulatory system.

The approval arrangements managed by the Department of Mines and Energy appear to be the most comprehensive and should be considered for accreditation in the first instance, subject to administrative improvements outlined elsewhere in this Report. The approval systems for land development managed by the Department of Lands, Planning and the Environment, could also be considered for early accreditation.

On balance, the Review concludes that Option 3 represents the least disruptive means of:

- enhancing 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; and
- maintaining environmental standards while delivering reduced regulatory timeframes, duplication and uncertainty.

Option 2 - a dedicated environmental authorisation - would also be effective in achieving regulatory certainty but, at least in the short term, would have additional transitional costs as the new system is established and bedded down.

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

Recommendation 1

That the NT Government strengthen integrated approvals processes delivered via the existing sectoral 'one-stop-shop' process, as follows:

- establishing criteria, performance standards and benchmarks for all approvals containing environmental conditions. These are the standards against which sectoral integrated approval processes can be accredited.

- consideration should be given to the following as a necessary starting point:
 - o the authorising legislation provides for environmental issues to be considered;
 - o the legislation permits the application and enforcement of environmental conditions;
 - o the legislation permits consideration of ESD principles in decision making;
 - o the agency has access to adequate skills and expertise;
 - o there is public consultation and a positive framework for proponents to build community confidence;
 - o decision making processes and reasons are transparent; and
 - o there is a formal compliance and enforcement policy that includes graduated compliance responses and penalties, regular compliance reporting, random compliance auditing and the capacity for directed compliance investigations;
- establish the Environment Minister as the decision maker for projects not subject to approval by an accredited approval process;
- accreditation should be issued by the Environment Minister following consultation with, among others, relevant colleagues and the EPA;
- where there is an EPA Environmental Assessment Report and/or advice, require responsible decision makers to publish a statement setting out how those recommendations are reflected in specific approval conditions;
- reinforce the existing requirements for publishing Statements of Reasons in circumstances where EPA recommendations are not implemented;
- require proponents to report annually and publicly on compliance with environment-related conditions of approval; and
- require the NT EPA to undertake regular assurance monitoring and reporting on the operation of the system to the Environment Minister.

Major Projects Facilitation

Australian jurisdictions operate in a competitive global capital market. Our resource endowment advantage is offset by higher labour and construction costs. Overseas investment locations are continually striving to improve their competitive position so Australian jurisdictions must be very careful to guard against complacency.

A common response to this pressure is the establishment of some form of Major Projects Facilitation or Co-ordinator General mechanism to assist large complex projects to navigate the approvals system. At the time of writing the NT operated an informal system of designating major projects. Once designated, a lead agency is appointed to assist with the early identification and resolution of issues that may lead to delays later in the process. The NT lead agency approach is also used in managing proponent expectations. When necessary there is also a Major Projects Cabinet Sub-Committee.

While the current system has undoubtedly assisted some proponents navigate the regulatory system, there is a lack of clarity about what constitutes a major project and under what conditions it should be granted major project status. This creates uncertainty and mistrust in the system.

Recommendation 2

Formalise the process for major projects facilitation through:

- unambiguous criteria for granting major project status;
- recognising that major project facilitation is intended to reduce transaction costs for proponents, not to supplant the decision making process;
- establishing a clear oversight process for coordination of various decisions, particularly where a project requires multiple decisions from multiple line Ministers or their delegates; and
- reporting arrangements to the Government on major projects' progress.

A Robust Best Practice System

Irrespective of which option for setting environmental approvals is chosen, refinements need to be made to the current system in accordance with the more detailed recommendations set out in this chapter.

EPA Operations and Assessment Process

The EPA's roles and functions are set out in various pieces of legislation governing its activities, principally the:

- *Northern Territory Environment Protection Authority Act*;
- *Environmental Assessment Act (EA Act)*; and
- *Waste Management and Pollution Control Act (WMPC Act)*.

In general terms, the EPA's current functions include to:

- promote ecologically sustainable development;
- advise Government on emerging environmental issues and the Government's capacity to tackle them;
- manage the environmental impact assessment process and provide recommendations to mitigate impacts;
- regulate waste management and pollution control;
- undertake independent inquiries; and
- enhance community and business confidence in the environmental protection regime of the NT Government generally.

Setting out the EPA's role, function and objectives in a number of pieces of legislation has contributed to a degree of uncertainty about the EPA's core remit.

The community will usually have greater confidence in the outcomes of environmental assessment and approval processes when there is an independent authority acting as a check and balance in the system. This arises from a general community concern about sectoral interests outweighing the broader public interest.

A Robust Best Practice System cont.

Many jurisdictions have wrestled with this tension. For example, in Western Australia, the EPA's role is sharply focused on its core function of providing independent advice on the assessment of major developments. Others, for example Queensland and the Commonwealth itself, simply place the functions into a Department of State (i.e. they have no 'independent EPA').

Further argument about this matter may be found later in this chapter under the Environmental Policy Development heading.

Reducing ambiguity, while retaining the EPA's independent role, will strengthen the environmental regulatory system by increasing clarity and certainty without risking delays in decision making. It would also increase system efficiency without undermining the environmental standards demanded by the public and the NT Government. Importantly, it would retain the EPA's independence, an important policy principle for the current NT Government.

The EA Act's scope also contributes to the uncertainty inherent in the current system. In particular, the objects of the Act (s4 a-e) are very wide. Increased certainty could be created if the objects focused more closely on assessment of actions - projects, activities, works, and plans or policies that directly facilitate actions - likely to incur material or serious environmental harm.

The NT EPA has expressed the view that the EA Act and the EAAP:

“... can be generally regarded as antiquated, often ineffective and inefficient. The legislation is often ambiguous, leading to difficulties in its administration.”

In the interests of certainty, ESD principles should be incorporated into the *EA Act* and the *NT EPA Act*. The most appropriate legislative formulation of these principles is set out in the *EPBC Act*. This would also facilitate alignment of the NT assessment process with that of the Commonwealth and enhance operation of the assessment and any future Approvals Bilateral Agreements.

Recommendation 3

In relation to approvals specifically, the EPA's role should be enhanced and focused to:

- provide independent evaluation of the impact of projects and recommend risk-based and outcome-focused environmental approval conditions. Recommendations made by the EPA to decisions makers in relation to manage environmental risk must be expressed in clear terms with performance statements that can be monitored effectively;
- ensure that the Environmental Impact Assessment (EIA) process is consistent with ESD principles;
- undertake assurance monitoring and reporting of the environmental approvals system within a formal assurance monitoring framework and policy set by Government;
- on request of the Minister, provide advice on issues affecting the NT's capacity to manage emerging environmental issues and actions necessary to enhance community and business confidence in the environment protection regime; and
- provide independent advice to the Minister on the operation of the bilateral agreements with the Commonwealth Government under the *Environmental Protection and Biodiversity Conservation Act*.

Completeness and Equity - the Need to Cover the Field

As a matter of principle, the environmental regulatory system should apply equally to projects with equal environmental impacts.

One of the characteristics of the NT system is that the trigger for a project or activity being referred to the EPA for assessment is largely dependent on the discretionary decision of a sectoral Minister.

In cases where there is no responsible Minister, projects with the potential for significant impacts have proceeded without referral to the EPA. The EPA estimates that 15% of the projects that it has assessed do not have a responsible line Minister. These projects have only been assessed because the proponents have voluntarily submitted the project for assessment. The NT EPA believes it has only limited powers to 'call-in' a project.

There is also the risk that different Ministers will arrive at divergent views regarding the potential significance of the environmental risk of projects and fail to refer them in a timely manner.

As a consequence of these risks, similar projects can be treated differently in the system and considerable time delays can accrue as the EPA and proponents or line agencies negotiate for an outcome. Either scenario detracts from the effectiveness of the NT system without improving economic or environmental outcomes. An equitable and efficient solution to these problems is to establish a clear and enforceable 'call in' power.

A 'call in' power would enable the Environment Minister to require a proponent to refer their project for consideration if it had not already been referred by a responsible Minister. For clarity, the power should not allow the Environment Minister to take responsibility for a project from an accredited SOSS process.

The knowledge of the existence of an enforceable 'call in' power would avoid considerable delay in the approval system as proponents would not have an incentive to game the system by failing to refer a project early. This power would also avoid uncertainty in those situations where there is no responsible Minister arising from the NT's unique land tenure arrangements.

To be enforceable, sanctions are required for failure to submit a notice of intent or to otherwise respond appropriately to the 'call in'. In particular, there needs to be an offence of commencing an activity before approval or conclusion of the assessment process.

Recommendation 4

Create an enforceable 'call in' power for actions that are likely to have a significant environmental impact and have not been referred by a proponent or responsible entity.

The 'call in' regime should:

- be a discretionary decision of the Environment Minister acting on EPA and/or Departmental advice;
- enable the Environment Minister to issue a time-limited stop work order for any action likely to have a significant environmental impact that has not undergone environmental assessment and approval;
- enable the Environment Minister to impose, subject to natural justice, enforceable conditions on a project in the event that a proponent does not submit a Notice of Intent (NoI) in response to a 'call in'; and
- create an offence of substantially commencing without prior authorisation a project that is subject to an assessment process.

Create a Tiered Risk-Based Environmental Assessment System

The EPA undertakes three different types of formal environmental impact assessment under its legislation:

- Public Environmental Report (PER);
- Environmental Impact Assessment (EIA); and
- Public Inquiry.

Over time, the distinction between assessment by PER and EIS has diminished to the point where there is only limited practical difference between them. This trend is evident elsewhere in

A Robust Best Practice System cont.

Australia. Generally there is a perception that PER is a lower level of assessment. This is not correct. The principal difference lies in the way in which public comments on the initial documentation are handled, not in the rigour of the assessment.

However, persistence with the distinction is counter-productive. It contributes to uncertainty for both the community and developers. The sense that a PER assessment is somehow of a lower quality - undermining community support for the outcomes - is unhelpful.

Efficiency and certainty can be increased if the two types of assessment are amalgamated into a single form. This assessment should contain the flexibility to tailor assessment guidelines, public consultation periods and response times to the risks and public concerns associated with particular projects.

Not all projects warrant assessment through a full blown EIA process. Projects that have manageable impacts, where the environment is well understood, where the proponent has a good track record of performance, and/or where the management interventions are tried and tested, do not need to go through a full EIA process.

The current Notice of Intent (NoI) process is being used informally by the EPA as a way of providing input on environmental management requirements to responsible agencies without the need to trigger a full EIA. Formalisation of this approach would yield significant efficiencies in terms of both cost and time in the assessment and approval processes for routine developments in the NT.

A corollary for this more streamlined assessment approach is the Assessment on Preliminary Documentation available under the Commonwealth *EPBC Act*.

A feature of NoI assessment is that it would not involve public consultation. It is therefore vital that the reasoning behind recommendations arising from this approach is set out publicly in a Statement of Reasons.

Documentation needed to make a valid NoI submission varies widely and needs to be standardised. In standardising, care should be taken not to overcomplicate this stage or overburden it with requests for comprehensive information.

The information required at this stage should be commensurate with the risks associated with the activity and the confidence level about the effectiveness of adaptive management arrangements. To the extent practicable, NoI documentation should be incorporated into, or drawn from, the documentation required by the responsible decision making agency. A proponent should not need to prepare two sets of documentation, but rather one focusing on the environmental risks associated with the project, management strategies to address those risks and the proposed performance monitoring to those ends.

Proponents who produce high-quality documentation and management strategies should be rewarded with quicker assessment processes. There should also be a positive expectation that proponents will work closely with the community to build confidence in the regulatory system and their management of environmental risks. Building this social licence is critical to smooth operation of a modern regulatory system.

There will also be a class of projects that are very familiar or routine; that are regarded as having a low environmental risk coupled with risk management methodologies that are well understood, and are occurring in environments that are not particularly sensitive. While the risk is low, there are still likely to be a number of standard conditions that proponents will need to comply with. A good example is the exploration phase of mining projects. In such circumstances, it is reasonable that the responsible agency should apply the standard conditions to the project approval without the need for formal referral of a NoI. This judgement should, however, only be made following formal consultation with the EPA.

Recommendation 5

Streamline the EIA process and create a tiered assessment system that is responsive to the degree of environmental risk associated with particular developments, the capacity to manage the risks and the performance of the proponent, which would:

- remove the existing Public Environment Report (PER) process and make the EIA process more flexible, with the capacity to select timeframes for assessment that reflect the environmental risks associated with a project;
- simplify EIA guidelines to focus on risk assessment and adaptive management responses rather than comprehensive descriptions of the environment;
- formalise assessment by Nol and enable the EPA to recommend environmental conditions at the Nol phase where the activity is well understood and the receiving environment is not particularly sensitive. As far as practicable, these conditions should be standardised;
- enhance the Nol phase to encourage proponents to bring forward risk-based outcomes-focused arrangements that incorporate performance-based adaptive management practices;
- reward good practice based on 'earned trust' so that proponents who produce high-quality documentation, management plans and build community trust are rewarded with a lighter assessment touch while those with poor documentation or practices are subjected to greater prescription;
- when seeking service agency input on an Nol, the EPA should concurrently circulate a draft decision for comment including potential conditions; and
- failure to comment in the prescribed time should be regarded as concurrence with the recommendations.

When to Refer?

As already noted, the NT EPA itself believes that the *EA Act* and the EAAP:

“... can be generally regarded as antiquated, often ineffective and inefficient. The legislation is often ambiguous, leading to difficulties in its administration.”

Nowhere is this more evident than determining when a project or action should be sent to the EPA to consider whether an assessment is required or not.

A drawback of the existing 'sectoral one-stop-shop' process is that commencement of the process is uncertain. Whose responsibility is it to refer a project to the EPA? Current practice is inconsistent. The *EA Act* is silent on the issue and the EAAP only refers to the responsible Minister (s 6). Considerable time can be lost where a responsible agency does not refer in a timely manner. Time and staff resources may also be consumed while officials negotiate a referral.

The situation is further confused by the lack of guidance about identifying the responsible Minister. The *EA Act* defines the responsible Minister as the Minister 'primarily' responsible for authorising the proposed action, but it is far from certain that this will always be clear cut or that there will only be one Minister with responsibility to authorise an action.

Responsible agencies, to the extent that they are known, should continue to be required to refer projects that they believe have an environmental impact requiring assessment, but responsibility for ensuring referral has occurred should rest clearly with the proponent. It is not reasonable for this vital step and the judgement it entails to rest with public servants.

A Robust Best Practice System cont.

More generally, the EPA has developed a system of identifying 'primary' and 'secondary' authorisations to help determine who should be regarded as the responsible Minister and by extension which Ministers/agencies should refer proposals for consideration as to whether assessment is required or not.

This inexact and sometimes illogical approach to determining the basic threshold to the environmental assessment and approvals system contributes greatly to uncertainty. Creating a more rational set of triggers for determining when a proposal or action should be referred to the EPA for consideration would markedly improve certainty in the system.

These triggers should be based on the anticipated environmental impact of an action rather than on the legislation that the action will be authorised under. The purpose of the trigger should be to determine if a Notice of Intent (or a referral) should be made to the EPA to determine whether environmental assessment under either the proposed Nol process or a formal EIA is required. Once the proponent has submitted the Nol information it will be clear whether or not there is a Minister, other than the Environment Minister, who should be designated as the responsible Minister and take carriage of the SOSS.

If there is no clear sectoral lead then the Environment Minister would issue any necessary environment approvals. This would represent a significant time saving in the approval process.

In April 2014, the EPA issued Environmental Assessment Guidelines that help to elucidate the circumstances when submission of an Nol is not required. These guidelines could be used as the basis for specifying the types of environmental impact that would trigger a requirement for submission of an Nol.

In general terms, the trigger should be constructed so that:

- if a proponent intends to undertake an action (or series of actions);
- and it is reasonable to conclude that the action(s) is likely to have a material environmental impact;
- then the proponent must either;
 - submit a Notice of Intent (refer the action) to the EPA for consideration; or
 - ensure that the responsible agency has submitted a Notice of Intent.

The NT Government may also wish to clarify the definition of an action to ensure that it is clearly defined and focussed.

The trigger could specify the classes of environmental impact that require referral. This would create further certainty in the system.

Consideration should also be given to including at least the following actions that impact on:

- the environment involving removal, destruction of, or damage to;
 - important areas of native vegetation;
 - the habitat of important populations of native vegetation, aquatic or terrestrial animals;
 - threatened plants, animals or communities that is likely to reduce their persistence or recovery; or
- the maintenance of ecological structure, ecological function or ecological process; or
- an area of high environmental value or beneficial use; or
- both ground and surface water, or
- air quality; or
- Matters of National Environmental Significance.

Recommendation 6

Create a clear trigger in the *EA Act* and the EAAPs setting out the circumstances in which a Nol (or a referral) is to be submitted to the EPA for consideration as to whether environmental assessment and approval is required.

The trigger should require referral when:

- a proponent intends to undertake an action (or series of actions); and
- it is reasonable to conclude that the action(s) is likely to have a significant environmental impact; and/or
- there is likely to be a significant impact on a Matter of National Environmental Significance.

Recommendation 7

Clarify the referral process to make it clear that a proponent has the responsibility to either:

- submit a Nol for their project to the EPA themselves if there is likely to be a significant environmental impact; or
- ensure that the relevant sectoral decision-making agency has referred the action to the EPA.

EIA Adequacy Tests and Currency

The EPA considers that the *EA Act* does not allow it to undertake an 'adequacy' review of an EIS or PER prior to the proponent publishing the documentation for public comment. The EPA's concern is that the resultant documentation may not contain sufficient information for advisory agencies and the public to make informed comment. Associated deficiencies have historically caused concerns for the Commonwealth Environment Department, frustrating operations of the previous Assessment Bilateral.

Considerable delay can occur in EIA processes as regulators and proponents negotiate behind closed doors on the adequacy of EIA documentation. A more effective means of creating the incentive for proponents to provide adequate information is needed.

The proponent, not the NT, should bear the risk associated with the production of inadequate information. At the moment the EPA/Government bears the risk because it is often portrayed as being responsible for delays in project approvals that arise from the provision of poor information by proponents.

The consequence of poor or incomplete information should be more stringent conditions and monitoring.

Rather than spending significant time to 'improve' inadequate documentation, the EPA should be able to notify the community of its concerns and allow the proponent to respond as they see fit. Publication of a 'preliminary report card' by the EPA along with the proponent's documentation would achieve this. Within this framework the EPA should, however, focus on the adequacy of risk assessments and the adaptive performance-based management systems that will be implemented, rather than the theoretical comprehensiveness of the environmental descriptions in the EIA document.

In a small jurisdiction like the NT, it can be difficult for the administration to support sufficient staff with skills in all areas likely to be encountered during assessments of a wide range of developments. One option is for the adequacy assessments to be undertaken through professional peer review funded by project proponents. Such an approach would have the twin benefits of reducing the cost burden on the public and ensuring high professional standards in the judgements inherent in judging sufficiency. Outsourcing this assessment would also guard against timidity, risk aversion and public service 'capture.'

Outsourcing the professional peer review would also have timing advantages as proponents could submit the peer review 'adequacy score card' along with the EIA or NoI documentation, thus avoiding the need for the EPA to undertake lengthy analysis in a linear manner.

This approach would also place more responsibility on the proponent to build their social licence.

Problems of currency also arise when proponents do not act on the terms of reference for an EIA within a reasonable period of time. Accordingly, the terms of reference for EIAs and subsequent assessment reports should be issued with clear statements about the length of time for which they will be valid, based on the likelihood of significant change to material environmental concerns.

Recommendation 8

The EPA should be empowered to publish an 'adequacy score card' concurrently with a proponent's EIA documentation. This scorecard:

- should focus on the adequacy of the environmental risk assessments and the sufficiency or completeness of the performance-based management arrangements proposed; and
- a draft of the scorecard should be provided to the proponent ahead of publication and the proponent should be given the opportunity to correct their documentation.

Consideration should be given to using peer review to outsource preparation of the adequacy scorecard. If 'supplementary reports' are required to correct information deficiencies then these reports should be subject to public disclosure prior to the EPA proceeding to finalise recommendations.

A Robust Best Practice System cont.

Recommendation 9

The terms of reference for EIAs and the subsequent Assessment Reports should be issued with clear statements about the length of time for which they will be valid. The length of time should be based on the likelihood of significant change to material environmental concerns.

Building Trust and Confidence

The most significant deficiency in the current process is its lack of transparency in relation to the uptake of environmental recommendations flowing from the EIA process. Recent changes to the *EA Act* (s 8A and 8B) have considerably improved the reporting by responsible Ministers in circumstances where they make a decision that is “contrary to the assessment report.”

The statutory test is, however, quite broad and open to interpretation. This is continuing to lead to a lack of public confidence that EPA-recommended conditions are in fact being implemented. This lack of transparency and inability to directly trace the uptake and implementation of conditions may also be a difficulty in negotiating a Commonwealth Approval Bilateral Agreement.

This problem causes mistrust, undermining social capital in the system and often contributing to slower, more time consuming processes. Over the long term, lack of trust in decision making of sectoral approval agencies could also lead to the imposition of more stringent conditions than strictly necessary.

A simple cost-effective solution is to require proponents to report annually on implementation of their conditions and the achievement of the prescribed performance outcomes. This would not add significantly to business costs as they should already be monitoring and tracking implementation of approval conditions, but it would increase transparency and confidence significantly. Performance in this regard should form an important element when judging whether a proponent has demonstrated “earned trust”.

It would also reduce the need to institute complex compliance monitoring arrangements by the NT Government.

Building community confidence in the overall system is essential. This can be achieved by charging the EPA with undertaking assurance monitoring of the system, which should be designed to shine a light on system operations as a whole rather than monitoring compliance with individual approval conditions.

Compliance monitoring should be undertaken, or facilitated, by the decision making agency.

Assurance monitoring should have a performance improvement orientation, as opposed to a compliance orientation, and should report on the:

- integrity of the assessment system - in particular whether systems are in place and operating effectively to ensure that actions requiring assessment or approval are being appropriately identified and assessed;
- effectiveness of the sectoral ‘one-stop-shops’, including compliance with transparency and reporting commitments;
- operation of risk management arrangements within the assessment and approval system to ensure that they are robust, well-modulated and used to achieve ESD outcomes;
- extent to which the system is delivering risk based, adaptive and outcomes focused decisions;
- operation of relevant quality assurance arrangements;
- extent to which proponents are demonstrably building community confidence;
- compliance of proponents with reporting, disclosure and environmental performance reporting obligations; and
- effectiveness of compliance and enforcement monitoring and reporting.

Recommendation 10

Enhance trust and confidence in the effectiveness of the 'sectoral one-stop-shop' environmental assessment process by:

- requiring responsible decision makers to report publicly on how they have put EPA recommendations into project approval conditions; and
- requiring proponents to report annually and publicly on compliance with environment related conditions of approval.

Recommendation 11

Charge the NT EPA with assurance monitoring and reporting on the operation of the system. This monitoring should have a performance improvement orientation, as opposed to a compliance orientation, and should focus on:

- the integrity of the assessment system - in particular whether systems are in place and operating effectively - to ensure that actions requiring assessment or approval are being appropriately identified and assessed;
- the effectiveness of the 'sectoral one-stop-shops', including compliance with transparency and reporting commitments;
- the operation of risk management arrangements within the assessment and approval system to ensure that they are robust, well-modulated and used to achieve ESD outcomes;
- the extent to which the system is delivering risk-based, adaptive and outcomes-focused decisions;
- the operation of relevant quality assurance arrangements;
- the extent to which proponents are demonstrably building community confidence;
- the compliance of proponents with disclosure and environmental performance reporting obligations; and
- the effectiveness of compliance and enforcement monitoring and reporting.

Environmental Policy

It is clear from the Second Reading Speech on the NT EPA Bill that the original intention was to establish an independent NT Environment Protection Authority with executive powers for environmental assessment. Policy functions were intended to be limited to the development of procedural guidance.

There is no consensus on the best administrative arrangement for environmental protection 'authorities' domestically or internationally. Various models include:

- fully independent bodies undertaking independent assessment and reporting roles only;
- bodies undertaking assessment roles only, but under the direction of a responsible Minister; and
- bodies where the assessment role is fully integrated into an agency of State, sometimes called an Environmental Protection Authority (EPA).

Some EPAs only have pollution control functions and do not participate directly in the planning and project approval process. The principle, even if not universal, of an independent EPA is an important one and should be retained. An independent EPA performs a public role that is in many respects analogous to the judiciary in that public confidence is greater when there is role separation between the body charged with adjudicating impacts and the body setting the 'rules of engagement' - the policy setting function. In Westminster-based democracies like Australia, this is the Minister through the Parliament. This separation of powers also ensures that the system does not stray too far toward extremes.

The policy framework, within which the EPA works, particularly in making ESD-based judgements, should be formulated by the responsible Minister.

A Robust Best Practice System cont.

As a relatively small jurisdiction, the NT cannot afford the luxury of maintaining and staffing environmental policy advisory functions within each agency with environmental responsibilities and within the Department of Lands, Planning and the Environment as well as in the EPA.

In this regard, it is timely and helpful that the NSW Parliament has recently inquired into the performance of the NSW EPA. In NSW the EPA is an independent authority, constituted as a Board, within the Environment Portfolio. The Chairman of the Board is also the CEO of the Agency. The inquiry found that this 'dual-hat' arrangement was inappropriate and did not facilitate good governance. It strongly recommended separating the two roles.

This NSW finding is consistent with that of the Australian Institute of Company Directors and the broadly accepted governance principles issued by the ASX Corporate Governance Council that:

“... the Chair of the Board ... should be an independent Director and, in particular, should not be the same person as the CEO of the entity.”⁷

The Commonwealth has also recently updated its Government Business Enterprise Guidelines to state that the chair of a Government-owned Board should not be an executive in the body they are overseeing.

Having examined the various models domestically and internationally the appropriate balance in the NT can be achieved cost effectively by:

- continuing the EPA's operation as an independent board with a dedicated chair;
- supporting the board's operations with a dedicated secretariat responsible for managing meetings, recording decisions, and liaising with the department, much in the way that cabinet secretariats operate;
- confirming the requirement that the Chief Executive of the Department of Lands, Planning and the Environment provide the EPA with all the necessary logistical and professional

support to perform its functions including assurance monitoring functions as well as other specified regulatory functions; and

- ensuring that the Department of Lands, Planning and the Environment is responsible through the CEO to the Minister for the Environment for policy development and implementation.

This model is similar to that under which the South Australian and Tasmanian EPAs operate. It is also the system under which the highly regarded statutory Western Australian Planning Commission (WAPC) has operated for a number of decades. In the Western Australian example, the Department of Planning provides professional and technical expertise, administrative services, and resources to advise the WAPC and implement its decisions. In this partnership, the WAPC has responsibility for decision-making while the department provides the resources, people and professional advice.

For clarity, recommendations made by the EPA at the conclusion of the assessment process should be provided directly to the responsible Minister for consideration. This is preferable to providing them first to the Environment Minister which would entail another time consuming administrative step. In practice, the EPA should advise the Environment Minister of its recommendations concurrently with providing them to the responsible Minister.

Considerable tension and conflict can arise from concurrent administration of the roles associated with independent assessment of the impacts of proposals and the roles associated with being the responsible regulator. In the NT, this conflict arises from the EPA's role in administering the *Waste Management and Pollution Control Act*. Consistent with earlier recommendations to strengthen the EPA's focus on assessment and monitoring, it is recommended that consideration be given to transferring the *Waste Management and Pollution Control Act* regulatory activities to a line agency.

As a similar matter of principle, it is problematic for an independent body (one that is not subject to Ministerial direction) to administer legislation.

⁷ Legislative Council of NSW Parliamentary Committee Report #5, 2015: "Performance of the NSW Environmental Protection Authority."

Another important area of government activity that has a large impact on the development approval area is the operation of threatened species protections, including the threatened species listing process.

Management of threatened species is regulated under the *Territory Parks and Wildlife Conservation Act*. Much of the administration of this Act is delegated to the Department of Land Resource Management. The principal regulatory instrument is the requirement for a permit to take or kill a threatened species. This regulatory approach tends to focus on the impact on individuals rather than populations more broadly. The legislation is dated and does not deal very well with systemic impacts on threatened species such as impacts on groundwater or other landscape scale habitat impacts.

There would be considerable merit in modernising the legislation and bringing the key policy and regulatory functions together. This would strengthen the integration of environmental regulation by consolidating threatened species considerations with other environmental impacts.

Recommendation 12

The overall capacity, capability and robustness of the NT environmental management system will be enhanced if there is a clear separation between the role of independent environmental assessment and the provision of advice to government on environmental policy.

This can be achieved by:

- confirming the operation of the EPA as an independent board with a dedicated chair;
- supporting EPA board meetings with a dedicated secretariat responsible for managing meetings, recording decisions, and liaising with the department, much in the way that cabinet secretariats operate;
- confirming the requirement that the Chief Executive of the Department of Lands, Planning and the Environment provide the EPA with all the necessary logistical and professional support to perform its functions including assurance monitoring functions as well as other specified regulatory functions;

- ensure that environmental policy development, including the development of guidelines and compliance and enforcement policies is performed within the Department of Lands, Planning and the Environment under the direction of the responsible Minister; and
- as with other respected independent statutory bodies the EPA's back office support, including the provision of professional and technical expertise, and administrative services should be provided by the line department.

Recommendation 13

The Government should consider modernising the approach to managing the impacts on threatened species currently set out under the *Territory Parks and Wildlife Conservation Act*. This would include consolidating the threatened species management functions.

Environmental Offsets

Over recent years, the Commonwealth has moved to clarify policy settings associated with the management of residual environmental impacts associated with projects that come under its assessment and approval regime. This approach, known as an 'offsets policy', is set out formally in the *EPBC Act Environment Offsets Policy (2012)*. It was developed as part of the national environmental law reform agenda to improve environmental outcomes through the consistent application of best practice offset principles to provide more certainty and transparency, and to encourage advanced planning of offsets.

A Robust Best Practice System cont.

A formal offsets approach has been beneficial to proponents, providing increased certainty and creating a level playing field between like projects. It also ensures transparency in negotiations with environmental officials.

The 'environmental offsets' term refers to measures that compensate for the residual adverse impacts of an action on the environment. Offsets provide environmental benefits to counterbalance the impacts that remain after avoidance and mitigation measures have been exhausted. They have been described as establishing an 'avoid, mitigate and offset' hierarchy and are most often used for managing residual impacts on threatened and migratory species.

Adoption of this hierarchy is a major element of the draft Approval Bilateral Agreements that have been released by the Commonwealth. Clauses 6.1 and 6.2 specifically require the NT Government to apply the "avoid, mitigate, offset" hierarchy to decisions likely to be made under the Agreement. If not resolved, this is likely to become a major sticking point in the negotiations. Most jurisdictions are either adopting the Commonwealth Policy or implementing a bespoke approach to applying the hierarchy to their decision frameworks.

The NT EPA currently applies an 'avoid or mitigate' hierarchy. The EPA has indicated some concerns that the Commonwealth Policy (which involves offsets as well as avoid and mitigate) is not well suited to the land tenure arrangements in much of the NT. This concern arises from issues associated with the perceived need for offsets to be given enduring and permanent protection - something that may be difficult under non-freehold forms of land tenure.

The requirement to create of enduring offsets has also been interpreted by some to mean that any offset should be incorporated into some form of protected area.

This is not a valid interpretation of the Commonwealth policy. In fact, careful reading of the principles embedded in the Commonwealth policy shows that there is ample scope for

offsetting arrangements that are based on improving landscape scale conservation security of protected matters (MNES). The NT is well placed to use this approach in combination with indigenous rangers and landholders to achieve both improved conservation outcomes for matters of NES and indigenous employment. In these circumstances, permanence is secured through long-term large scale enhancement of ecosystem management and reduction in threatening activities such as predation by feral cats.

This approach could be built into a bespoke NT offset policy. It is understood that prior to formation of the NT EPA a reasonable amount of administrative work had been undertaken within a variety of NT agencies in this regard. This work was not finalised, but can easily be revisited in light of changes in thinking and national policy settings. In the interim, adoption of the Commonwealth policy, at least for those projects likely to have a significant impact on a matter of NES, and therefore be subject to the bilateral agreement would be a useful way of providing increased certainty to industry. Resolving this issue, more than any other, is likely to reduce the risk of inconsistent treatment of projects by NT authorities and the Commonwealth.

Recommendation 14

The NT should develop an environmental offsets policy as a priority, based on the 'avoid, mitigate, offset philosophy'. In the interim, the NT Government could adopt the Commonwealth Offsets Policy.

An NT-specific offsets policy should consider the conservation value of large scale threat reduction such as fire and feral animal management in offsetting the residual impact on native flora and fauna, and protected species. In this context, large scale land management undertaken by indigenous land holders and ranger groups has an important role to play in offsetting the ecological impact of localised development.

Land Development and Strategic Planning

Both Infrastructure Australia and the Productivity Commission have stressed the importance of high quality strategic planning to improve the approval pathway for major or large scale developments. Advanced land and strategic planning systems can greatly enhance the project approvals system.

There are two related concepts:

- Strategic Environmental Impact Assessments, similar to that proposed by the *EPBC Act*; and
- Strategic Planning which is most often undertaken in land use planning systems.

Both are valuable and should be undertaken in a cost-effective integrated way by enhancing analysis of environmental impacts during the planning process.

The Productivity Commission sees strategic planning as a tool that can help to improve the way development approval processes operate. Strategic plans can indicate broad preferences for the location of particular types of developments. Where such plans are underpinned by community consultation and consideration of environmental, heritage and other values, they can reduce the number of issues that need to be considered at the project level.⁸

The Productivity Commission found that State and Territory Governments could improve the quality of strategic planning by placing greater emphasis on: strategic decision making; effective community consultation; gathering and disseminating baseline environmental and heritage data; and analysis of the environmental and other impacts of plans.

Well executed strategic planning and strategic assessment have the capacity to greatly increase certainty, lower the cost of subsequent approvals and shorten the timeframes for individual projects. The Productivity Commission's work showed that this could occur in three ways.

First, in some cases work done at the strategic planning stage can remove the need for further environmental impact assessment later in the development approval process.

Second, the strategic planning process can resolve high level trade-offs between development, environmental and other values in a transparent way. It can also provide certainty about which areas are suitable for development.

Last, well executed plans can establish the performance requirements and outcomes to be achieved from multiple developments in a region. For example, the strategic planning process can identify the overall water extraction capacity for an area and avoid the need for this to be revisited by each subsequent development. The Melbourne Urban Growth Boundary Strategic Plan is a good example of these benefits - it removed the need for separate Commonwealth and State environmental approvals for myriad urban developments. It also provided pre-approval for a range of complying developments in low risk areas, and it clarified the outcomes and performance standards to be met by developments in more sensitive locations, thus reducing their overall approval time.

The extent to which strategic planning can be of utility is somewhat related to the nature of the anticipated development and complexity of the regional environment. Where the range of possible future developments in a region being strategically assessed is more predictable, it may be easier to generate efficiency savings through the establishment of clear plans. For example, within and around Australia's capital cities, planners have reasonable confidence that there will be continued growth

⁸Productivity Commission 2013: "Major Projects Development Assessment Processes."

A Robust Best Practice System cont.

in housing stock, as well as demand for roads, airports, public transport, hospitals, schools and other infrastructure necessary to facilitate urban development. Accordingly, in these regions, strategic assessment can be used to provide long-term direction and certainty.

In more remote areas, the type and location of possible developments, other than mines, may be less certain. For instance, the location, size and nature of future resource projects may be difficult to predict making the use and cost of developing a full strategic plan less effective. In these circumstances, strategic analysis may be usefully employed in the lead up to a series of identified resource-related projects in a region and can establish clear requirements that projects need to meet and remove the need for detailed assessment of particular issues at the project level. For example, strategic analysis of biodiversity values can reduce the need for on-site assessment, lead to greater certainty about which areas of native vegetation can be cleared or preserved, and help plan any likely mitigation works such as establishing advance offsets.

Strategic assessment in remote locations can also be a useful means for improving baseline data and making it available to Governments and proponents to assist them plan for the future.

In its submission to the Productivity Commission Review, the NT supported the role of strategic planning in lowering costs to proponents, increasing efficiency of approval processes and shortening project timelines. In particular, the NT felt that improved strategic planning is important for processing hubs and infrastructure corridors. Strategic planning for industrial hub locations well ahead of their intended use has the potential to reduce significantly many negative impact issues on the wider community from development.

The NT Planning Commission was established under the *Planning Act* in 2013 to prepare integrated strategic plans for inclusion in the NT Planning Scheme.

Amendments to the Planning Scheme (rezoning and exceptional development permits) can occur without consideration as to land suitability assessment. This means the Minister is not required to

consider the capability of the land to support a particular type of proposal at the time the Planning Scheme is amended to allow for it. The suitability or capability of the land can extend to factors such as flood risk, impacts on threatened species or impact on key ecological functions such as wildlife corridors.

This lack of early consideration can, and has, produced instances where land is zoned for a particular purpose which land suitability information indicates is inappropriate. This sets up the potential for long delays in subsequent approvals, increased cost to the NT associated with managing the situation and difficulties in expectation management. Once the land is zoned, most developers have an expectation that they can use it for that purpose.

Moreover, land suitability is considered late in the process as part of the development assessment process. Where there has been a rezoning such that a particular use is permitted, there may be no subsequent development application required (for example, if land has been rezoned SD - single dwelling, there is unlikely to be any further development assessment process). This can give rise to a situation where no further application is required for development to occur.

This situation places a significant burden on government. It also represents a significant risk insofar as land may be zoned for what are factually impossible or inappropriate uses. In order to address this, consideration of land suitability needs to be brought forward.

The *Planning Act* currently provides a list of mandatory considerations in relation to development permits. It does not specify mandatory considerations in relation to exceptional development permits or planning scheme amendments (rezoning) other than where a planning scheme amendment is sought as part of a concurrent application process (i.e. where a planning scheme amendment and development permit are applied for concurrently).

Ongoing work by the Territory Government in relation to reducing regulatory red tape has identified a number of key implementation tasks as:

- prepare and finalise strategic land use plans and other policy documents; and
- tighten the use of exceptional development permits.

These actions are supported. There are, however, considerations that need to be built in to these strategic land use instruments if they are to ensure land development progresses efficiently with appropriate environmental outcomes. This is critical if these instruments are to contribute to improved environmental impact decision making.

NT strategic planning process improvements will also facilitate future Commonwealth accreditation under the *EPBC Act* strategic assessment provisions. If achieved, this will further streamline Commonwealth/Territory decision making.

Access to land and environmental information is an important component of improved planning. In order to comply with the proposed Approvals Bilateral (cl 8.2) the NT Government should work towards ensuring that environmental information is discoverable, accessible and re-usable by government agencies, the community and proponents. This will reduce the cost to developers.

Recommendation 15

Strengthen long-term strategic land use planning processes so that, as far as possible, environmental considerations and constraints - including threatened species impacts - are considered when strategic land use decisions are being made. This could be done at the time of formulating strategic area plans and/or planning scheme amendments. The resultant plans and policies should promote ESD of future urban land.

Strategic Planning documents should clearly set out the environmental constraints associated with the planning area, level of environmental risks associated with the development concept, and establish a set of outcome performance criteria to be met by individual developments under the plan.

In order to comply with the proposed Approvals Bilateral (cl 8.2) the NT Government should work towards ensuring that all environmental information is discoverable, accessible and re-usable by the community, proponents and other government agencies.

A Robust Best Practice System cont.

Recommendation 16

The *Planning Act* should be amended to:

- require strategic planning to, as far as possible, establish outcome-based environmental performance standards that will apply to subsequent developments. The standards should cover management of at least the potential significant impacts on Matters of National Environmental Significance, NT threatened species and communities, water resources, natural environments and habitats. Standards could also include management of construction impacts such as noise and dust;
- require consultation with the EPA during the strategic planning process on the environmental risk assessment and performance standards. Further, the government may also wish to require the EPA to make recommendations to the Minister whether the plan:
 - has considered all relevant environmental risks;
 - has factored these risks into the final design appropriately;
 - and that, if implemented, the scheme is not likely to jeopardise continued functioning of important ecosystems; and
 - that the outcomes will not be inconsistent with ESD;
- require assessment of environmental risks at the zoning stage of development with the aim of ensuring that subsequent development is ecologically sustainable. The assessment and associated ESD decision should be published along with the zoning decision; and
- exempt land development from further need for environmental impact assessment by the EPA in circumstances where the environmental risks have been assessed during the zoning.

Recommendation 17

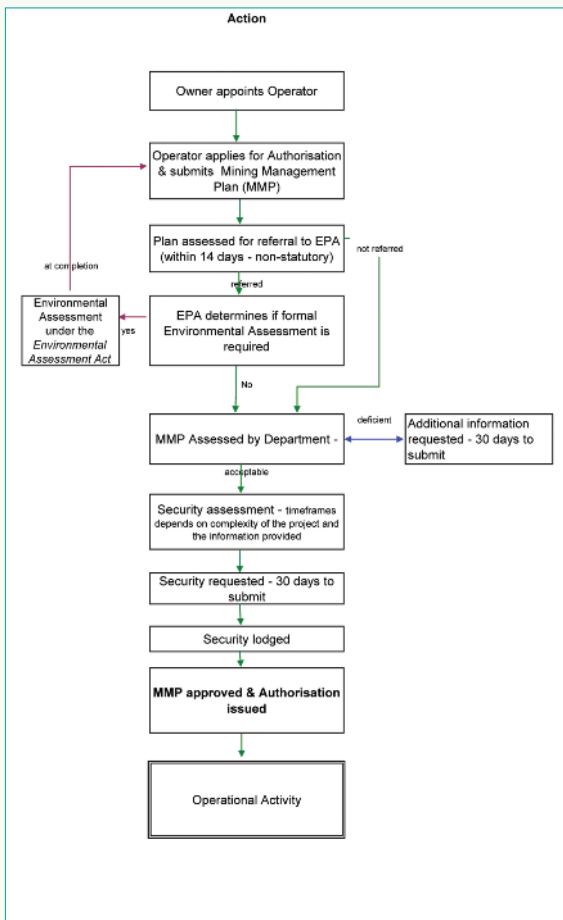
Outside the areas subject to planning controls, the Department of Lands, Planning and the Environment, in consultation with the EPA, the Department of Mines and Energy and the Department of Land Resource Management, should undertake high level bioregional strategic environmental assessments. The purpose of such assessments should be to facilitate strategic environmental risk analysis and establish the environmental performance guidelines that subsequent development projects in these regions would need to meet.

Integrated Approval for Minerals Developments

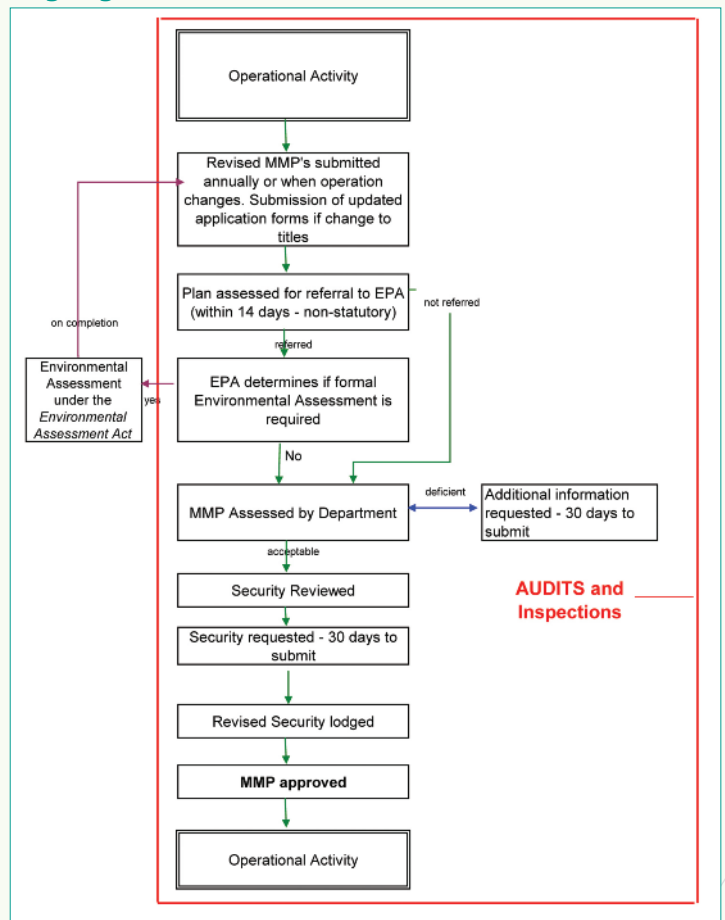
Minerals developments are a significant element of the NT economy, representing a class of activity that often triggers the need for environmental assessment and approval. Accordingly, the approvals system authorised under the *Mining Management Act* is an important pathway for environmental assessment and approval.

Figure 2 sets out the major steps in the MMA Authorisation Process, followed by Figure 3 which sets out the process for Ongoing Activities.

MMA Authorisation Process



Ongoing Activities



A Robust Best Practice System cont.

Under this system, the key document is the Mining Management Plan (MMP).

As explained above, a combination of legislation regulates mining activity. Mining tenure is managed under the *Minerals Titles Act* while minerals development is managed under the *Mining Management Act (MMA)*. The *Petroleum Act (PA)* covers management of oil and gas tenure and development.

The Department of Mines and Energy advises that both the MMA and the PA are based on the premise of ‘co-regulation.’ That is, they do not seek to prescribe the *minutiae* of operational decisions, but aim to place responsibility on operators to ensure they have adequate systems in place to mitigate environmental impacts. They also operate on the premise that mining will entail unavoidable environmental impacts. The system is therefore heavily reliant on relationships of trust, both between the operators and the regulators and between the community and the regulators.

This Report’s recommendations for improvements in the management of environmental issues and increasing transparency are designed to strengthen these relationships without increasing compliance costs for the mining sector.

In a related piece of work, the NT Government is examining changes to strengthen the petroleum sector’s regulatory regime. As a consequence, the remainder of this section will focus only on minerals sector arrangements.

The major device used to assess and manage potential environmental impacts associated with minerals development is the annual approval of Mining Management Plans (MMPs) prepared under the MMA. In most cases, the MMP forms the basis for a Notice of Intent submission to the EPA where the activity is likely to have a significant impact. Referral to the EPA can occur for new activities as well as changes to existing mine site activities.

A feature of the environmental assessment and approval system - ensuring that the processes for preparing and assessing the MMPs are fit for purpose - will be critical to ensuring that the overall system is effective and efficient. This should form one of the performance tests for accrediting SOSSs.

Considerable evidence was taken during the *Inquiry into Hydraulic Fracturing and the Potential Impacts on the Environment* and during research for this Report that indicates the approach to regulating petroleum development in South Australia has been successful at:

- improving decision-making times and processes;
- providing effective management of environmental issues;
- delivering confidence and certainty to developers; and
- building community and business confidence.

The SA legislation is expressed by the SA Department of State Development as “objective based and outcome driven.” With respect to environmental performance, the SA legislation states that its objective is:

“... to ensure that, in carrying out regulated activities, licensees -

- (a) ensure that regulated activities that have (actually or potentially) adverse effects on the environment are properly managed to reduce environmental damage as far as reasonably practicable; and
- (b) eliminate as far as reasonably practicable risk of significant long-term environmental damage; and
- (c) ensure that land adversely affected by regulated activities is properly rehabilitated.”⁹ (emphasis added)

This statutory requirement is given effect through Statements of Environmental Objectives (SOEs) for classes of activity that have first undergone an assessment of potential risks and impacts in the form of an Environmental Impact Report. A single development or series of developments may therefore operate under a number of SOEs.

The SOEs are effectively performance and condition statements for classes of activity undertaken by either a single operator or by operators undertaking essentially similar activities in similar environments. This ability to leverage off earlier work undertaken by unrelated proponents is an important efficiency characteristic of the SA system.

⁹ South Australian *Petroleum and Geothermal Energy Act 2000*.

Another important characteristic of the system is the way in which SOEs are expressly written as outcome (performance) statements and objectives. Examples include statements like:

- avoid contamination of aquifers;
- no introduction of new species of weed ... or pests; and
- solid wastes and foreign material to remain contained on site ... until disposed of at an EPA approved facility.

Each outcome statement is then supported by a series of measurable actions designed to achieve the outcome and manage the risk associated with it. These actions can be adjusted over time to ensure the outcome is delivered. This approach provides significant flexibility.

Many of the features of the SA system are directly transferrable to the NT - this is particularly the case for the way in which objectives are expressed as performance statements and the use of a contestable framework for reducing environmental impacts to "as low as reasonably practicable" (ALARP).

Another important feature of the SA system is that all Environmental Impact Reports, SOEs and monitoring reports are made publicly available. The SA Department feels that this transparency is a critical element in the success of the system in terms of building community confidence and in the transferability of SOEs between operators. By contrast in the NT, Mining Management Plans are expressly confidential. This should be corrected as a matter of urgency.

The SA system has been highly effective in the oil and gas sector. Some modification will be required to translate it to the minerals sector. In particular, smaller minerals developers may not be in a position to invest as heavily in the necessary upfront environmental impact review and initial development of SOEs. If this is the case, then there is advantage in the NT preparing regional statements of environmental performance as per Recommendation 17. These Strategic Assessments could then be used as the basis for the development of 'model' statements of environmental objectives that could be adopted by small operators *in lieu* of developing their own bespoke performance statements and arrangements.

As mentioned above, the MMPs, which are the key document in the NT assessment process, have proven to be a sound basis for managing mine development and impacts. However, there is scope to improve these plans. The requirements currently set out in the existing Advisory Note on the structure and preparation of extractive MMPs requires provision of considerable descriptive information. The MMPs would be enhanced greatly if there were a requirement for clearer statements of performance outcomes to be achieved by the plan in relation to environmental impacts.

Currently, there is an over reliance on the operator's environmental policies in setting the operational objectives for the environmental section of MMPs. While understandable from the perspective of co-regulation, there is a need for the NT to set minimum environmental performance requirements independent of the mine operators. Adoption of the SA ALARP framework and style would be beneficial in building certainty and community confidence.

The environmental obligation established under the MMA is that, within a general obligation to take care of the environment, a mine operator must ensure that environmental impacts are:

"... limited to what is necessary for the establishment, operation and closure of the site."

A Robust Best Practice System cont.

This is a quite weak obligation and inherently presumes that the mining activity will in all cases trump the potential environmental impact - there is no circumstance in which the impact would be regarded as unacceptable. This is inconsistent with ESD concepts. While this may not in fact be the case in practice, the perception that it creates is not conducive to operation of a robust regulatory scheme required to build community confidence that unacceptable environmental impacts will not flow from mine development.

Under the co-management model, judgements around establishing what is 'necessary' are resolved during development and approval of the mining management plans. This is reasonable, but it is not transparent given the confidential nature of the MMPs.

The ALARP test used in South Australia and elsewhere has the effect of minimising environmental impacts in a framework of continual improvement rather than static acceptance.

Operationalising this concept requires distinctions to be drawn between different elements of a mining operation. ALARP will necessarily yield different levels of environmental impact in those parts of a mine site under active exploitation as opposed to those areas of a site that surround operations.

A system that requires proponents to strive for the lowest impact and continual improvement - as ALARP does - is a useful adaptive management mechanism capable of responding to changed circumstances, knowledge and technical capacity. It is particularly valuable for projects that have an extended lifecycle such as mines or those that might take many years to reach completion. Its success is, however, tightly bound up with the extent to which the judgements associated with efforts being 'reasonable' and 'practical' are tested.

Concerns about regulator capture by stakeholders will undermine the ALARP approach's value if the associated public contestability associated with these judgements is not visible. Full disclosure is a simple cost-effective way to provide this public scrutiny and build confidence in the system.

The confidentiality arrangements associated with MMPs is contributing to inefficiencies in the assessment and approval system. Apart from the impact that confidentiality has on community trust, much of the information contained in the relevant environmental sections of an MMP is the same as that required for EPA referrals and, potentially, for streamlined assessments. It is understood that the Department of Mines and Energy has been attempting to institute an unprotected Public Environmental Mining Report that contains a subset of this information contained in the MMP. Unfortunately, this initiative has been delayed in consultations with the sector which should be brought to a head.

Preparation of a public Environmental Mining Report (EMR) will be a significant advance and should be acted on as a priority. Greater benefit would be gained by making the relevant sections of an MMP publicly available. This would allow the one document to perform a number of roles. Significant transaction costs are associated with the need to produce three and sometimes four different documents drawing on essentially the same descriptive and risk assessment information (the MMP, the EMR, the Nol, and potentially the PER).

This duplication also contributes to uncertainty. As each of these documents is slightly different, uncertainty arises about which version the operator is bound to implement. There can also be no clarity about the way in which EPA recommendations are expressed in the MMPs while they remain confidential.

Preparation of thorough MMPs represents a significant investment by operators. Subject to the reporting arrangements below, it should be possible to extend the period of application for individual MMPs and remove the requirement for annual updating.

Confidence will also be enhanced in the efficacy of environmental decision making under the *Mining Management Act* if transparency is increased around critical decisions. Increased confidence will underpin continued use of the mining 'one-stop-shop'. In addition to any decision not to implement EPA recommendations, the following should be made public in the interest of creating an effective regulatory system:

- reasons associated with a decision to refer or not to refer an MMP to the EPA;
- the MMP's environment management elements and the Statement of Reasons supporting the judgement that the plan is acceptable;
- the annual proponent reports on implementation of relevant elements of MMPs and their performance; and
- the results of any compliance monitoring or audit.

Disclosure of this information does not represent a cost burden on operators, but it would deliver significant improvements in the operation of the overall assessment and approval system. The transparency associated with these changes would also be expected to provide greater confidence in the co-regulatory approach and reduce compliance monitoring costs for the NT.

Recommendation 18

Test and accredit the integrated approval process under the *Mining Management Act* where the Minister for Mines and Energy grants project and environmental approval to mine developments against the criteria established under recommendation 1, subject to:

- consultations between the Department of Mines and Energy and the EPA to ensure that the guidelines for preparation of the environmental component of Mining Management Plans are fit for purpose;

- establishing as a performance standard for Mining Management Plans that "adverse effects on the environment are managed to reduce environmental damage to as low as reasonably practicable";
- guidance for the preparation of Mining Management Plans to ensure that they are risk-based and outcome-focused. Actions to manage environmental risk must be expressed in clear terms with performance statements that can be monitored effectively;
- increase transparency and confidence in the process by providing public Statements of Reasons for key decisions including:
 - the decision to, or not to, refer Mining Management Plans to the EPA;
 - the judgement about the acceptability of the environmental controls in Mining Management Plans; and
 - the likelihood that the anticipated residual environmental impact is as low as reasonably practicable;
- publication of the environmental impact management sections of Mining Management Plans. Commercial-in-confidence exemptions should be strictly limited;
- publication of annual mine environmental management performance reports prepared by proponents; and
- development of a compliance reporting strategy that facilitates appropriate publication of compliance audits.

A Robust Best Practice System cont.

Recommendation 19

Streamline the requirements for Mining Management Plans and Environmental Mining Reports so that they can be used as the Nol under the *EPA Act*. This will remove the considerable duplication currently undertaken in preparing multiple documents covering essentially the same issues.

Recommendation 20

Grant approval to Mining Management Plans for periods that are related to the scale of environmental risks and the likely effectiveness of proposed management interventions. These approvals should be granted for periods of up to five years, subject to annual performance reporting. This will reduce transaction costs for industry and approval agencies without increasing environmental risk.

Mine Site Water and Waste Management

Both the *Waste Management and Pollution Act* and the *Water Act* contain exemptions for mining and petroleum activities so that waste and water impacts that occur wholly within a mine site are managed under the *Mines Management Act*. Off-site emissions and waste are managed under the *Waste Management and Pollution Act*. If a mining activity results in off-site impacts it will potentially be regulated under the *Mining Management Act*, the *Waste Management and Pollution Act* and the *Water Act*. This overlapping jurisdiction has the potential to create significant inefficiencies and uncertainties.

This issue is being considered as part of the review of the *Waste Management and Pollution Act* that commenced in September 2014.

Consideration should be given to removing the duplication of effort that arises as a result of the *Waste Management and Pollution Act* and the *Water Act* not applying inside mine sites. A single regulatory process covering both on-site and off-site risks might be appropriate if there are no unintended consequences

associated with changing the existing arrangements. Potential consequences would be explored before any changes to the pollution regulation regime are implemented.

A single process could be achieved by either:

- removing the existing exemptions for mine sites, allowing the regulation of water impacts and waste and pollution to be undertaken by the EPA; or
- removing the exemption and delegating¹⁰ responsibility for *applying the relevant provisions of the Waste Management and Pollution Act* and the *Water Act* to the Department of Mines and Energy under similar transparency arrangements as apply for environmental regulation.

Simply extending application of the *Waste Management and Pollution Act* and the *Water Act* to mine sites would compound the risk of multiple agencies being responsible for regulation of mining activities. Delegating responsibility to the Department of Mines and Energy under appropriate monitoring and reporting arrangements is consistent with the operation of a consolidated environmental regulatory regime.

Recommendation 21

Consider amending the *Waste Management and Pollution Act* and the *Water Act* to create a single regulatory regime for management of mine site water, waste and pollution both on and off-site. Responsibility for administering this arrangement might be delegated to the Department of Mines and Energy under appropriate monitoring and reporting arrangements when the Acts are triggered by mine-related activity.

¹⁰ For clarity, delegation should only occur for those circumstances where the impact is likely to arise from mine-related activities.

Approvals Legislation

The draft Approvals Bilateral Agreements released by the Commonwealth require jurisdictions to act consistently with Australia's international obligations that relate to Matters of National Environmental Significance (MNES), such as the Ramsar Convention, when deciding whether or not to approve a development impacting on MNES. The Agreements also require jurisdictions to have regard to Commonwealth environmental policies and plans, including threatened species conservation advice and action plans, when making decisions and setting conditions.

Unfortunately, it is far from certain that NT decision makers are empowered under their relevant legislation to consider international commitments or national policies when making their decisions.

There is also uncertainty as to whether NT decision makers can lawfully impose some or all of the EPA recommendations following an EIS because of limitations in approvals legislation. For example, the power to impose conditions on a project may not extend to requiring the preparation of, and compliance with, an Environmental Management Plan.

While this uncertainty remains, there is considerable risk to the effectiveness of the decision making process and the certainty demanded by stakeholders. This arises from the real prospect that the uncertainty could be exploited by litigious opponents of future developments, significantly delaying project approvals.

This risk can be eliminated by amending the relevant approvals legislation to put it beyond doubt that, when making approvals decisions, the decision maker can:

- consider environmental issues, including relevant international obligations, national policies, guidelines and plans;
- consider cross-border issues;
- implement via conditions any advice of the NT EPA;
- impose environmental conditions, including conditions relating to offsets and requirements for management plans;
- require public performance monitoring and reporting; and
- enforce conditions.

Recommendation 22

Ensure that all primary decision making legislation used to authorise projects and developments provides for the decision maker to:

- consider environmental issues, including relevant international obligations, national policies, guidelines and plans;
- consider cross-border issues;
- implement via conditions any advice of the NT EPA;
- impose environmental conditions, including conditions relating to offsets and requirements for management plans;
- require public performance monitoring and reporting; and
- enforce conditions.