Joint Northern and Central Land Council

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

Environment Protection Bill and Model Regulations in the Northern Territory

December 2018

This submission was prepared by Jeff Smith of WestWood Spice

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

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Abbreviations and Acronyms

ALRC	Australian Law Reform Commission
CLC	Central Land Council
EPBC Act	Environment Protection and Biodiversity Conservation Act
EIA	Environmental Impact Assessment
ESD	Ecologically Sustainable Development
IPA	Indigenous Protected Area
NLC	Northern Land Council
NTCAT	Northern Territory Civil and Administrative Tribunal
NT EPA	Northern Territory Environment Protection Authority
PBC	Prescribed Bodies Corporate
SEA	Strategic Environmental Assessment
TEO	Territory Environmental Objectives
UNSDGs	United Nations Sustainable Development Goals

Executive Summary

It is a widely held view that the current regulatory framework is outdated, and the various reports in recent years are replete with examples of inconsistency, lack of transparency and even disregard for the rule of law. Laws cannot operate effectively without community trust and confidence and it is clear that there is little faith left in the current system.

In this respect, the reforms (the Bill and Regulations) are certainly a clear improvement on the current system and what has gone before. This submission identifies a number of elements to the reforms which are supported, and what can be seen as strengths. These include:

1. Stand-alone environmental assessment
2. Elements of transparency and accountability
3. Plain English language drafting
4. A suite of protective measures
5. Recognition of the public interest
6. A decision-making standard
7. Improved compliance and enforcement
8. Sustainable development opportunities

At the same time, this submission raises significant concerns around other elements of the reforms which threaten to undermine the gains made. These include:

1. Retreat from access to justice
2. Limited public participation
3. Limited protection of Aboriginal interests
4. Unclear role for Territory Environmental Objectives (TEOs)
5. Lack of transparency and accountability
6. Discretionary decision-making
7. Inadequate timelines
8. The role of the NT EPA
9. Unclear assessment pathways
10. The need to strengthen ecologically sustainable development (ESD)
11. The absence of climate change
12. The need to commit resources.

Introduction

Overview

The Northern Land Council and Central Land Council (hereafter NLC and CLC) continue to welcome the reform process being undertaken by the NT Government, and the opportunity to be part of this process and comment on the Environment Protection Bill and Model Regulations.

Now is the time for change. The current regulatory framework is outdated, and the various reports in recent years are replete with examples of inconsistency, lack of transparency and even disregard for the rule of law. Laws cannot operate effectively without community trust and confidence and it is clear that there is little faith left in the current system.

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

This submission is structured simply. It sets out the key strengths and concerns regarding the Bill and Regulations below (under **Key observations**). Further specific analysis of the Bill and Regulations can also be found under **Appendix 1**.

For this submission, the NLC and CLC commissioned an expert consultant, Jeff Smith, to review the Environment Protection Bill and Model Regulations. The expert consultant has worked with the Land Councils in producing this report. This report builds on the submission and accompanying expert report which was prepared for the discussion paper in June 2017. **Appendix 2** sets out the status of the recommendations made in that report under this Bill and Regulations – that is, adopted, not adopted, unclear.

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

At the outset, it is important to note that Aboriginal people and – in turn – the NLC and CLC are significant stakeholders in this process. Aboriginal people make up over 25% of the population (ABS 2016) and hold extensive Aboriginal property rights and interests, including native title.[1] This highlights the significant role for Aboriginal people as owners, managers and major investors in policy and programs relevant to these cultural, economic, social and environmental interests.

However, these interests are not recognised in current legislative, institutional and policy frameworks. Aboriginal representation on bodies such as the NT EPA Board and any advisory boards should reflect this significant role.

In this sense, it is imperative that legislation to protect the environment recognises and facilitates the status and cultural values of the Northern Territory's first peoples. Any new legislation should require assessments and approvals to be done in accordance with the principles of ESD that incorporate specific reference to Aboriginal cultural knowledge and the protection of Aboriginal cultural values.

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

- retain the strengths of the Bill and Regulations as set out in our submission
- address the stated concerns, including a stated and public commitment to properly resourcing the new system
- immediately commence ongoing consultation with CLC and NLC and other key stakeholders over the offsets policy and other administrative elements still being worked through, including the role of the NT EPA in relation to environmental impacts to Aboriginal people and the incorporation of Aboriginal traditional knowledge in the assessment processes
- immediately commence an appropriate engagement process with Traditional Owners through the Land Councils, particularly on key questions such as community consultation and incorporation of traditional knowledge, to ensure prior and informed consent in the development of legislation and policy frameworks.

[1] Since the passage of land rights legislation in the Northern Territory, approximately 50 percent of the land in the Northern Territory has become Aboriginal land (in addition to 85 percent of the coastline): see Australian Institute of Aboriginal and Torres Strait Islander Studies (2016) Native Title Information Handbook, Northern Territory at p 3.

About the Land Councils

This submission is made jointly by the Northern Land Council (**NLC**) and the Central Land Council (**CLC**) (**Land Councils**), both independent statutory authorities established under the (CTH) *Aboriginal Land Rights (Northern Territory) Act 1976* (**Land Rights Act**).

A key function of the Land Councils is to express the wishes and protect the interests of traditional Aboriginal owners throughout the Northern Territory. The members of the Land Councils are chosen by Aboriginal people living in each Land Council's respective area.

The Land Rights Act sets out the Land Councils' core functions, which include:

- identifying relevant Traditional Owners and affected people
- ascertaining and expressing the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters
- consulting with traditional Aboriginal owners and other Aboriginal people affected by proposals
- negotiating on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim
- assisting Aboriginal people carry out commercial activities; obtaining Traditional Owners' informed consent, as a group
- assisting in the protection of sacred sites
- directing a Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

The Land Councils also fulfil the role of Native Title Representative Bodies under the (CTH) *Native Title Act 1993* (**Native Title Act**), whose role and functions are set out under Part 11, Division 3 of the Native Title Act. In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt.

For the purposes of this submission, the term ***Traditional Owner*** will be used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act), native title holders (as defined in the Native Title Act) and those with a traditional interest in the lands and waters encompassing the NLC and CLC's regions.

Within their respective jurisdictions, the Land Councils assist Traditional Owners by providing services in their key output areas of land, sea and water management, land acquisition, mineral and petroleum, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice. Relevant to this submission, is a responsibility to protect the traditional rights and interests of Traditional Owners and other people with interests over the combined area of the Land Councils, which is constituted by more than 627,000 square kilometres of the land mass of the Northern Territory, and over 80% of the coastline.

Key observations

Strengths

1. *Stand-alone environmental assessment*

For the first time, the Northern Territory will have a single environmental approval process with the Minister for Environment and Natural Resources as decision-maker. This means that proposals which have a significant environmental impact or fall within a trigger – such as mining, pastoral leases, water management[2] - will not be able to proceed without this approval. It also means that the protection of threatened species – almost exclusively on-park at the moment – can be considered and promoted through the EIA process.

This was the favoured option (Option 2) under the Hawke II Review. Under this approach, the environmental approval (or refusal) will be issued by the Minister based upon the NT EPA's advice. It ensures a level playing field across the Northern Territory whereby no industry is treated favourably; rather, the level of scrutiny depends on the environmental significance of a proposal.

2. *Elements of transparency and accountability*

The Bill contains a number of positive elements in terms of transparency and accountability. For example, reasons are required regarding the following:

- declaration of TEO or trigger: cl 40(b)
- Minister's consideration of EPA recommendations: cl 42(4)
- Minister's decision on approval notice: cl 77(b)
- refusal/approval where EPA sees unacceptable impact: cl 91(2)(a), 92(1)(b) and 93(3)
- amended environmental approval: cl 104(3)
- entry to a residence: cl 154(1)(b)
- issuing of a warrant: cl 156(3)(b)
- exemption: cl 262(3).

Furthermore, there is a need to publish and/or give notice so that the documents can be inspected:

- environment protection policy: cl 29, 30
- proposed TEO or trigger: cl 38, 39(1)(b)
- declaration of TEO or trigger: cl 40(b), 41

[2] See Mining Management Act, Pastoral Land Act and the Water Act.

- proposed TEO or triggers under review: cl 44, 45(1)(b)
- declaration of protected areas: cl 51, 52(1)(b), 52(2), 53(1)(b)
- assessment report and other documents: cl 83
- environmental approval: cl 93
- amended environmental approval: cl 104(3)
- public register: cl 258 and schedule 1.

3. Plain English language drafting

Legislation can often serve to confuse rather than clarify. However, the Bill is drafted in plain English and this is a key strength.

4. A suite of protective measures

The Bill introduces a range of measures to protect and enhance the environment including environment protection policies (Part 3) an overriding environmental duty (Part 4), protected environmental areas and prohibited actions (Part 5 Division 2) as well as environmental bonds, levies and funds (Part 9). These are all supported and should be actively operationalised.

5. Recognition of the public interest

The Bill recognises that the protection of the environment is inextricably linked to the public interest. This is a positive step and is reflected in provisions which ensure that public interest considerations underpin security for costs, undertakings for damages and Court costs (see clauses 217(2), 222 and 223). Injunctions – interim, prohibitory, mandatory as set out in clauses 215-217– may also be commenced by a broad range of people under clause 214(2). It is further submitted this this strong foundation be strengthened by the following changes:

- making it clear that pubic interest relevantly includes indigenous interests under clauses 222(2) and 223(2)
- making explicit provision for protective costs orders so that a Court may make an order specifying the maximum amount of costs that one party can recover from another.[3]

6. A decision-making standard

The Bill introduces a high standard of decision-making that moves away from a purely discretionary approach. This is an excellent approach. For example, cl 87(2) states:

> (2) Before granting an environmental approval for an action, the Minister must <u>be satisfied that</u>:

[3] See, for example, (NSW) Uniform Civil Procedure Rules 2005 (NSW), r 42.4(1).

(a) the community has been consulted on the design of the action; and

(b) the significant impacts of the action have been appropriately avoided or mitigated or can be appropriately managed; and

(c) the action is acceptable; and

(d) the action is consistent with the principles of ecologically sustainable development; and

(e) if appropriate, residual significant impacts will be appropriately offset.

Similarly, clause 195 states:

> The Minister may issue the closure certificate to the approval holder if the Minister is satisfied that:
>
> (a) all rehabilitation and remediation requirements in relation to the action have been completed in accordance with this Act and the environmental approval; and
>
> (b) the approval holder has met the relevant closure criteria; and
>
> (c) the approval holder has complied with any requirements of section 196.

7. Improved compliance and enforcement

The Bill contains a number of provisions which are considered, or approach, best practice. These include investigation powers of officers, sentencing principles, duties to notify and additional Court orders (see clauses 153, 156, 159, 163, 167, 176, 183, 195, 196, 208, 248 and 249). These are commendable aspects of the Bill.

8. Sustainable development opportunities

The Bill allows for strategic assessment opportunities to be referred by proponents (see clause 64). There is little clarity on what constitutes strategic assessment under the Bill and Regulations (a suggested framework is outlined under 9.1 below). However, where used elsewhere, the approach is generally to identify development pathways and conservation opportunities upfront. In other words, do the planning at a large scale first, reducing or eliminating the need for site-scale referrals later. The Bill also allows for referral to be made jointly (see clause 65), which may provide opportunities for the Central and Northern Land Councils to work together to develop and protect the lands in a sustainable way.

Furthermore, the Bill recognises environmental offsets (Part 8) with the CLC and NLC supporting offsets from two perspectives – firstly, as communities directly and indirectly affected by the environmental, social and/or cultural impacts of projects, and, secondly, as businesses taking part in the offset economy. As was stated in the submission to the Discussion Paper in 2017:

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

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

To this end, principles need to be devised that ensure that environmental offsets sit within a sound regulatory framework and hierarchy, are evidence-based and enduring, and are enforceable and so on. It is also important that an offsets framework is applicable to the Northern Territory, rather than simply borrowed from another jurisdiction like the Commonwealth.

Further to this, in its submission in June 2017, the Land Councils sought:

- community consultation prior to a Discussion Paper
- the preparation of a Discussion Paper on offsets (including principles and mechanisms to address ecological, social and equity considerations)
- the establishment of an independent Steering Committee with oversight and advisory functions.

This has not occurred, and administrative efforts to develop a discussion paper are unknown. These remain issues of abiding concern to NLC and CLC and it is vitally important that the Land Councils are involved in these discussions.

Otherwise, the reforms certainly support the development of an offsets framework and guidelines, as well as the establishment of an offsets register (Part 8 of the Bill). Precious little detail is otherwise offered. The status of existing Guidelines, dating back to 2013, are also unknown.

Concerns

1. *Retreat from access to justice*

The Bill originally contemplated an expansive approach to standing, with open standing for judicial review and broad standing for merits review. This was based on the assumption that all Territorians have a role to play in protecting the environment, and that community participation is crucial to the effective operation of the laws. Unfortunately, by a media release on 30 October 2018, the Northern Territory government walked away from this commitment before the submission period had ended. The flagged changes to standing are a major setback, and risk destroying a good deal of community trust from the outset.

Based on the media release, it would seem that the test for standing will extend to proponents, those directly affected and those who have made a genuine and valid submission. This test will be narrower than the common law and exclude special interests including Land Councils and environment groups. This is an extraordinary backflip and completely counter to the spirit and direction of the reform process, as well as the recommendations of the Pepper Inquiry.

In contrast to the change of heart by the NT Government, there is no reason to restrict standing where there is a breach or anticipated breach of an environmental law, or the prospect of harm. NSW has had open standing – where any person can bring proceedings - in most of its environmental legislation for nearly forty years. During this time, there has been no evidence to suggest that open standing provisions result in frivolous or vexatious appeals – the so-called 'floodgates' argument.[4] Rather, the experience has shown that the public has shown a strong, legitimate interest in ensuring that decision-makers are held to account, and that proponents are complying with their development approval. In this regard, the ALRC has recognised that neither the Attorney General nor government agencies can be trusted with enforcement due to a "range of political, financial and bureaucratic factors".[5]

More prosaically, the NT Government may lack the necessary resources to ensure compliance, while open standing provides public interest litigants with the opportunity to enforce. The removal of standing also shifts the analysis – and precious, limited community resources – away from the substantive matter, and onto whether the community or environmental group is entitled to be in the Court.[6]

2. Limited public participation

Public participation is recognised as one of the key purposes of the EIA process: see 59(1)(c). Notwithstanding this resolve, there are several provisions where there is no provision for community consultation. These include:

- environmental approval granted if Minister rejects statement
- amendment of approval
- revocation at request of holder.

The relevant clauses are 92(2), 104(2) and 110(4).

[4] The Hon Justice Peter McClellan P (2005) Chief Judge at Common Law Supreme Court of NSW "Access to Justice in Environmental Law: an Australian Perspective", paper presented at Commonwealth Law Conference 2005 London 11-15 September 2005.
[5] Australian Law Reform Commission (1996) Beyond the door-keeper*:* Standing to sue for public remedies at 2.36: see http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html
[6] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 272.

In these instances, there are provisions for consultation; however, these consultations are only with the proponent and internal to the NT Government. In this respect, there is also consultation with the proponent regarding a draft environmental approval (which is ill-advised) but no community consultation: see cl 86(2).

Moreover, there are no mechanisms under the Bill or the Regulations which recognise the need for culturally appropriate consultation, including on-country[7] consultation during the EIA process.

Currently, crucial data is often not released until late in the process, and there is not sufficient time for it to be adequately reviewed, let alone communicated to Indigenous stakeholders who are directly affected. The reforms do not adequately address this.

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

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

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

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

- a presumption of on-country consultation
- the need for plain English and local language versions of documents, or parts of documents
- the importance of culturally appropriate practices

[7] In this context the term 'on-country' means at communities and/or homelands local to the proposed development.

- who is to be consulted, including Traditional Owners and diverse Aboriginal communities
- resources provided to facilitate engagement.

When considering the adequacy of EIA, NT EPA should consider the failure to complete consultation reports and engagement plans adequately (for example, in accordance with the guidelines) as part of its review.

3. Limited protection of Aboriginal interests

There is almost a complete absence of protections around Aboriginal interests, engagement and consultation. In fact, the Bill only explicitly mentions Aboriginal interests in relation to the power of officers to enter onto Aboriginal land (making it clear the power is the same as for others in the Northern Territory) and Aboriginal Land Councils being eligible applicants (now seemingly removed and/or the subject of uncertainty given the 30 October 2018 media release).

This absence of protections runs counter to the commitment under the Discussion Paper which stated:

> *ensuring Aboriginal people and traditional environmental knowledge are included and recognised in the [community participation] process.*

Both the Bill and the Regulations are silent on this. While guidance documents (as envisaged by clause 265) may deal with these issues, best practice would suggest that they should be included in the Bill itself. There is no recognition of Indigenous people in the objects.

Four changes are suggested regarding objects, definition of the environment, Aboriginal traditional knowledge and TEOs.

3.1 Objects

It is submitted that the objects of the new environmental assessment legislation need to include recognition of the role of First Nations and Indigenous people in the conservation and ecologically sustainable use of natural and cultural resources, and in decision-making processes around them.

Territory legislation already provides a model – that is, explicitly referencing Aboriginal culture, knowledge and decision-making processes.[8] It is submitted that the connection to Country of First Nations and Indigenous people should also be explicitly acknowledged. On this basis, the objects should include:

[8] See (NT) Territory Parks and Wildlife Conservation Act ss 25AB and 25AC. Similarly, many of the objects under the (CTH) EPBC Act 1999 reflect a commitment to recognising and promoting traditional knowledge: see sections 3(1)(d), 3(1)(f), 3(1)(g), 3(2)(g)(iii) and 3(2)(g)(iv).

- recognising the unique connection between Indigenous people and country, which encompasses spiritual, cultural and physical connections and reflects a worldview in which people are considered to be of the same spirit as the landform, species and plant life.
- valuing and incorporating Aboriginal culture, knowledge and decision-making processes, as well as the connection between Aboriginal people and Country, being land, seas and waters.

3.2 Environment

The proposed definition of environment under the Bill reproduces the current definition under the (NT) Environmental Assessment Act and the NT EPA Act.

This is outdated and should be broadened to incorporate First Nation's peoples and cultural values, and social and cultural values more generally.

One suggestion is to support a version of the definition of environment under the EPBC Act 1999 – for example:

environment includes:

(a) ecosystems and their constituent parts, including people and communities; and

b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d) heritage values of places; and

(e) the social, economic and cultural aspects (including those pertaining to First Nations' peoples) of a thing mentioned in paragraph (a), (b), (c) or (d).

3.3 Aboriginal traditional knowledge

Aboriginal traditional knowledge should be integrated into the Northern Territory's environmental impact assessment process. This would be consistent with developments under international law and best practice, including the United Nations (UN) Declaration on the Rights of Indigenous Peoples,[9] the Biodiversity Convention 1992[10] and the United Nations Sustainable Development Goals (UNSDGs).[11] It would also reflect, and promote, the fact that Land Councils have developed considerable expertise and experience in integrating Aboriginal traditional knowledge into contemporary land management practices (through such mechanisms as Indigenous Protected Areas (IPAs) and joint management arrangements).

[9] Articles 19, 29 and 31.
[10] Articles 8(j) and 10(c).
[11] Many of the 17 UNSDGs are relevant for indigenous peoples and have direct linkages to the human rights commitments outlined in the UN Declaration on the Rights of Indigenous Peoples.

Aboriginal traditional knowledge has developed over millennia and is key to management of a variety of specific environments, yet it remains largely ignored by governments, industry and by environmental scientists and managers. This is the outcome of ineffective policies that have been implemented without consideration of the value of traditional knowledge, and how it can be respectfully acquired and utilised to improve conservation of the Northern Territory environments.

Currently, recognition of traditional knowledge in the environmental impact assessment process in the Northern Territory remains a matter of policy, not law.

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

Incorporation of traditional knowledge into legislation and through every stage of the EIA process would address this. Any new legislation must specify the principle that Aboriginal participation and knowledge is vital to effective environmental assessment and management. Supporting materials (such as the guidelines) must, in turn, also reflect this principle.

Embedding this approach will require time, resources and collaboration with Land Councils. Land Councils have significant experience combining traditional knowledge with contemporary land management practices and processes which enable Aboriginal decision-making. This experience and expertise must be leveraged if traditional knowledge is to be integrated effectively.

We also note examples from other jurisdictions where resources have been developed with Indigenous people to enable traditional knowledge to be communicated in a way that can be integrated into environmental assessment and management processes, One such example is the 'Cultural Health Index' tool, developed in New Zealand to recognise and incorporate Māori values in river management.[12]

Further, and notwithstanding Land Councils' support for robust transparency measures, it is also critical that legislation should include protections to ensure that sensitive cultural information recorded as part of the assessment process is not publicly released.

[12] New Zealand Ministry for the Environment, 'A Cultural Health Index for streams and waterways: A tool for nationwide use', Accessed at < http://www.mfe.govt.nz/publications/fresh-water/cultural-health-index-streams-and-waterways-tool-nationwide-use/1>

3.4 Framework for TEOs

As set out immediately below, the utility of TEOs is unclear. Notwithstanding this, it is also of concern that the current draft of a framework for TEOS and objectives does not mention Aboriginal interests. NLC and CLC have previously advised on how this could be done: see **Appendix 3**.

4. Unclear role for Territory Environmental Objectives (TEOs)

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

A fundamental concern is that the use of TEOs unnecessarily complicates matters. To a large extent, the notion seems to be based on ensuring that a large amount of unnecessary information is not supplied in the referral stage. This concern is shared by many, with voluminous EISs either inadvertently or deliberately making community participation and good decision making difficult in an environmental assessment and approval context.

These problems could, however, arguably be better dealt with by the current simpler test – for example, significant impact on the environment – coupled with greater administrative guidance about what should be addressed and a strong commitment to plain English versions of EIS documents. The Bill already contemplates guidance documents under clause 265. In this context, administrative guidance can mean guidelines about significant impact (as used under federal legislation) coupled with Environmental Assessment Requirements (used in NSW to address matters specific to the project).

An additional concern is that the use of TEOs will skew the assessment process – that is, only TEOs or triggers are assessed. Once again, where an impact is less than significant, no assessment is undertaken. This is the position under federal legislation.[13] But the Northern Territory is not the Commonwealth, which only has a role in regulating matters of national environmental significance.

If triggers are to be used, they should be integrated into the legislation and accompanied by a safety net of projects with significant impact generally. Suitable triggers around climate change, water quality and use, shale gas, biodiversity, land management and cultural and social values should be included.

The example of shale gas and fracking highlights the problems with the proposed approach under the reforms. The Scientific Inquiry into Hydraulic Fracking in the Northern Territory revealed widespread concerns throughout the Territory about shale gas and fracking. The Inquiry also highlighted that there are significant regulatory

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

gaps regarding the management and regulation of shale gas and fracking, including the fact that the water trigger under the (CTH) EPBC Act 1999 does not apply to shale gas and fracking proposals.[14]

However, nothing in the Bill or the Regulations serves to alleviate these concerns or to repair, or take account of, these regulatory gaps. Three problems remain:

- the proposed triggers under the Framework of Northern Territory Environmental Values and Objectives do not explicitly mention shale gas and fracking nor set out whether such proposals will be captured
- the triggers are not contained in the legislation itself (unlike the (CTH) EPBC Act) but rather are merely gazetted under the Bill
- the Bill does not define significant impact, and thus there is significant uncertainty as to which proposals will be captured.

5. Lack of transparency and accountability

Notwithstanding the observation above (Strengths per 2. Elements of transparency and accountability), there are a number of elements of the Bill and regulations which cause concerns around transparency and accountability.

First, there does not seem to be any clarity or consistency around what is in the Bill and what is in the Regulations. In fact, many of the Regulations mimic provisions under the Bill and look like they were excised at the last moment.

The Bill should contain substantive provisions with the detail left to the Regulations. Provisions relating to reasons, publication, notice and decision-making and methods of assessment are not matters for the Regulations. Rather, the Regulations should only set out how these provisions are operationalised and give the details. An example of this distinction can be found under the Environmental Planning and Assessment Regulations 2000 in NSW. See clause 80:

> **80 Publication of notice for designated development**
>
> For the purposes of section 4.64 (1) (g) of the Act, the notice for a development application for designated development:
>
> (a) must be published on at least 2 separate occasions; and
>
> (b) must appear across 2 or 3 columns in the display section of the newspaper; and
>
> (c) must be headed in capital letters and bold type '**DEVELOPMENT PROPOSAL**'; and

[14] See Chapter 7 of the Scientific Inquiry into Hydraulic Fracking in the Northern Territory on water generally and recommendation 7.3 on extending the water trigger.

(d) must contain the same information that is required under clause 78.

For more examples, see
https://www.legislation.nsw.gov.au/#/view/regulation/2000/557/part6/div5

Second, there are a host of key concepts which are relegated to the Regulations. These include 'fit and proper person', variations, exemptions, environmental practitioners and environmental auditors.

For example, practice around Australia has also shown that variations (or modifications) of actions or proposals are frequently used to bypass environmental protections. At present, the Bill allows for the extensive processes around variations to be dealt with under Regulations (under Part 7). However, the process should be set out in the Act, not relegated to the Regulations.

Furthermore, exemptions need to be restricted as they have the potential to undermine the law. Exemptions can currently be granted to a person or class of persons under the Regulations (under clause 267(2)(f)). Similarly, the current proposed exemption under clause 262 does not contain sufficient checks and balances. An example of such a provision where checks and balances are built-in is found under NSW pollution law:

> An exemption may be granted in:
>
> (a) an emergency (including, for example, fires, floods and fuel shortages), or
>
> (b) circumstances where:
>
> (i) the EPA is satisfied that it is not practicable to comply with the relevant provision or provisions, by implementing operational changes to plant or practices; and
>
> (ii) the EPA is satisfied that non-compliance with the provision or provisions will not have any significant adverse effect on public health, property or the environment; and
>
> (iii) the Board of the EPA approves the granting of the exemption.[15]

Similarly, in other jurisdictions, the test regarding fit and proper person is regarded as sufficiently critical to be dealt with under the legislation.[16]

Third, there are specific instances where the Bill and Regulations fall short of principles of transparency and accountability. These include:

- the lack of a principle of accountability (as used in Victorian legislation)

[15] (NSW) Protection of the Environment Operations Act 1997 s 284.
[16] Under the (NSW) Protection of the Environment Operations Act 1997 it is contained in section 83; in Victoria, it is found under (VIC) Environment Protection Act 1970, which refers to an offence in the last 10 years under s 20C.

- the lack of a need to set out how the principle of ESD is considered under cl 14(3)
- the exclusion of the community from reasons where the Minister does not accept the EPA's recommendation (see cl 93(4))
- key access to justice provisions around publication and notice being relegated to the Regulations (see clauses 8-15, 23, 30, 31, 34, 35, 38, 41 and so on)
- limited community consultation around certain government decisions (as noted above 92(2), 104(2) and 110(4))
- the failure to indicate penalty levels for offences under the Bill.

6. *Discretionary decision-making*

Closely related to the above, there are also numerous provisions where there are a lack of checks and balances in relation to decision-making, Discretion is an important component of decision-making. At times, however, the Bill extends the discretion too far. For example, the Minister and CEO are often allowed to consider any matter they consider relevant for key decisions such as:

- fit and proper person: cl 76(4), 87(3) and 105(2)
- matters for decision: cl 87(1)(d)
- extension and transfer of environmental approval: cl 100(2) and 116(1)(d)
- starting proceedings: cl 229(c).

Likewise, cl 71() defers variations to the Regulations reducing the transparency and accountability of the reforms. For clauses 62(1) and 68(1), the use of discretionary language produces uncertainty as to the applicable pathway for dealing with variations and call-in notices.

7. *Inadequate timelines and consultation*

These need to be reassessed generally, as they often seem too short (being based on federal laws). For example, clauses 74 and 86(2) put the onus on the government and the agency to respond in a very short time. Deemed approval/refusal provisions under clause 88(4) risk further entrenching potential problems. Moreover, as noted above, there are no mechanisms under the Bill or the Regulations which recognise the need for culturally appropriate consultation, including on-country consultation in the EIA process.

The failure to put in place these changes – longer, more culturally appropriate consultations - will inevitably result in weaker decision-making, which has costs further down the development track and destroys community confidence in the planning system. The current, short timeframes will not deliver certainty and business confidence, as may be suggested.

The alternative is to significantly increase agency resources and personnel to assist the NT EPA and the Minister to administer the Act. In the absence of this commitment, the adoption of short timeframes will not work to protect the environment.

8. The role of the NT EPA

The role of the NT EPA has been clarified to undertake advisory and assessment functions in recent parallel reforms. A key change is that the NT EPA will no longer be the regulator for waste and pollution management (amongst other things); rather, its role will shift to provide advice on specific proposals, policies, or plans to manage the environmental impacts of development.

Taking Aboriginal cultural heritage as an example, it is not clear that the NT EPA is equipped for this role. Under the legislation, a member of NT EPA is only required to have certain core skills (such as business, science and law) and may have other skills around indigenous issues.[17]

The current composition of NT EPA is as follows:

- Dr Paul Vogel, Chair
- Ms Janice van Reyk
- Dr Ian Geoffrey Wallis
- Mr Colin Joseph (Joe) Woodward
- Ms Samantha Nunan
- Dr David Ritchie.

Based on information provided on the NT EPA website, only Mr Woodward and Dr Ritchie have any experience with Aboriginal cultural heritage, and only Dr Ritchie has any formal professional expertise. There is no Aboriginal representation on the NT EPA Board, notwithstanding that Aboriginal people make up 25% of the NT population. The expertise within NT EPA is unknown.

On this basis, it is entirely unclear what expertise NT EPA will have to properly assess impacts on the unique connection between Aboriginal people and land and seas, as well as impacts on culturally significant areas. A similar conclusion can be reached in regard to the incorporation of Aboriginal traditional knowledge in assessment processes. Notably, neither the Bill nor Regulations provide much guidance on these issues.

The NT EPA's independence should be further strengthened by empowering the organisation to maintain its own staff, including being furnished with adequate resources to enable the organisation to fulfil its functions.[18]

[17] See sections 10(2)(b) and 10(3)(a)(ii)) of the Northern Territory Environment Protection Authority Act.
[18] In this respect, it is submitted that current arrangements under section 37 of the Northern Territory Environment Protection Authority Act, where the NT EPA receives support and assistance from staff in the Department of Environment and Natural Resources to fulfil its functions, should be repealed.

9. *Unclear assessment pathways*

The Bill and Regulations make provision for a standard assessment or a strategic assessment.

Both these pathways are important and have key roles to play in assessing impacts, protecting the environment and facilitating sustainable development. In particular, strategic assessment – done properly – has enormous potential to assist Aboriginal communities.

9.1 Strategic assessment

As the Hawke Review into the *EPBC Act 1999* stated:

> *Indigenous peoples have long established systems of knowledge and practice relating to the use and management of biological diversity on Australia's natural environment. Strategic assessments … present good opportunities to build Indigenous consultation strategies that are meaningful and capable of facilitating Indigenous interests in long-term decision-making.*[19]

The Regulations make clear that a standard assessment encompasses some form of EIA (whether on referral information, by supplementary report, by EIS or by an inquiry: see cl 5 of the Regulations). However, strategic assessment is not defined, nor are there any parameters placed on it. Rather, it is defined in circular fashion under cl 4 of the Bill as:

> *strategic assessment means a strategic assessment carried out in accordance with the regulations.*

The Regulations do not define strategic assessment but simply set out the processes around it. These do not clarify its role under the new approach – for example, clause 21 of the Regulations states:

> *The NT EPA may accept a referral for a strategic assessment if it considers it appropriate to do so.*

The Hawke Review into the federal *EPBC Act 1999* was very supportive of strategic assessment as a tool but equally also very critical of the lack of accountability and transparency around strategic assessment there.[20] The Bill and Regulations reproduce these problems. Also, the fact that strategic assessment can be proponent driven arguably exacerbates them.

[19] Para 143.
[20] See Chapter 3 generally and particularly paras 3.32-3.60. See also Part 1 para 79, and recommendations 4(1) and 6.

To redress this, it is suggested that strategic environmental assessment should be strengthened under the Bill and Regulations and be based on the following principles:

- science-based tools
- strong decision making criteria, including a 'maintain or improve' test
- comprehensive and accurate mapping and data
- early adoption for maximum benefit
- requiring alternative scenarios to be considered
- ground-truthing of landscape-scale assessment
- mandating public participation at all stages for positive outcomes
- SEA complementing, not replacing, site-level assessment.

At present, the lack of accountability around strategic assessments may allow for Territory-region or basin-wide proposals for fracking to be pushed through. This would be a calamitous outcome which would immediately undermine community trust in the reform process.

9.2 The need for a level playing field

The Bill also contains transitional provisions which risk creating an inequitable two-tiered system. Under clause 268(3), the Bill seeks to not disadvantage a person through decreasing their rights or increasing their liabilities. At the same time, it is important that these protections are not afforded to corporations. Otherwise, there will be projects with little or no oversight (such as the McArthur River Mine) operating alongside projects where there is ongoing oversight that may extend beyond the life of the project.

10. The need to strengthen ecologically sustainable development (ESD)

ESD is included in the Bill. The promotion of ESD forms part of the objects under clause 3 and Part 2 Division 1 contains principles of ESD. The structural embedding of ESD in the Bill is welcomed.

The following points suggest ways in which ESD can be improved under the Bill, based on the experience around Australia since the concept was introduced in 1992.[21]

First, a stronger approach is strongly recommended. Over the years, other jurisdictions have tried various models around incorporating ESD into legislation including:

[21] National Strategy on ESD 1992.

- an object to be promoted[22]
- a matter for consideration in the carrying out functions[23]
- imposing a duty on decision makers to take ESD into account
- a means of framing actions to be undertaken[24]
- a roadmap for how the objects are to be achieved[25]
- an ecological bottom line which needs to be sustained.[26]

The latter two options above are strongly preferred. In NSW, national parks legislation requires the following:

> The objects of this Act are to be achieved by applying the principles of ecologically sustainable development.[27]

Evidence-based 'maintain and improve' and 'neutral or beneficial' tests have also been used to ensure that developments, land clearing and water quality are healthy and sustainable.[28] South Australia has embarked on a strategic plan which contains a suite of environmental targets.[29]

Second, the principle relating to biodiversity conservation (clause 19) should be further strengthened. For example, in NSW and Victoria the legislation states "conservation of biological diversity and ecological integrity should be a fundamental consideration".[30]

Third, the principle in relation to economic competitiveness should be removed. This concept has not been part of ESD since 1992, nor has it appeared in other jurisdictions since that time. It can only operate to weaken environment protections under the reforms.

Fourth, clause 14(3) should be removed. It states:

> *In making a decision under this Act and stating the reasons for that decision, a decision-maker is not required to specify how the decision-maker has considered these principles.*

As presently drafted, this clause is inconsistent with an approach which places ESD principles as a central element of the Bill, and undermines the Northern Territory's approach to environment protection and environmental assessment.

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[22] (NSW) *Threatened Species Conservation Act 1995* s 3(a) (now repealed).
[23] (NSW) *Greater Sydney Commission Act 2015* s 9(b); (NSW) *Waste Avoidance and Resource Recovery Act 2001* s 6.
[24] (NSW) *Native Vegetation Act 2003* s 3; (QLD) *Environment Protection Act 1994* s 4(1).
[25] (NSW) *National Parks and Wildlife Act 1974* s 2A.
[26] (QLD) *Environment Protection Act 1994* s 3; See (VIC) *Commissioner for Environmental Sustainability Act 2003* s 4(1); (NZ) *Resource Management Act 1991* s 5.
[27] (NSW) *National Parks and Wildlife Act 1974* s 2A(2).
[28] (NSW) *Biodiversity Conservation Act 2016* Part 8; (NSW) *Threatened Species Conservation Act 1995* Part &AA (biocertification) (now repealed); *State Environmental Planning Policy (Sydney Drinking Water Catchment)* 2011 cl 10 (development consent cannot be granted unless there is a neutral or beneficial effect on water quality).
[29] SA Strategic Plan at http://saplan.org.au/priorities/our-environment
[30] See (NSW) *Protection of the Environment Administration Act 1991* s 6(2)(c) and (VIC) *Environment Protection Act 1970* s 1E.

In summary, it is imperative that ESD is properly integrated throughout the assessment and approval process. This should include:

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

11. The absence of climate change

The Discussion Paper in 2017 alluded to the consistent feedback about the need to take climate change into account throughout the assessment and approval process. Notwithstanding this point, neither the Bill nor Regulations mention climate change.[31]

Climate change should be integrated into the assessment and approval process, and this resolve should be apparent under the Bill. This should include:

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

Further, integrating climate change considerations as part of the assessment and approval processes will assist the NT EPA and Government to identify offset needs and opportunities.

[31] Outside of the Bill and the Regulations, the consultation paper on *Establishing a Framework of Northern Territory Environmental Values and Objectives* does mention a Changing Climate as an environmental value; however, even this is an example only.

12. The need to commit resources

The reforms represent a new and often ambitious approach to environmental management in the Northern Territory. It is crucial that this ambition is backed by adequate resources to ensure that the administrative machinery of the reforms is working effectively, as well as to ensure that compliance and enforcement measures under the Bill are augmented by sufficient resources to ensure that decision-makers and companies who break the law are held to account.

Appendix 1: Status of recommendations from CLC/NLC submission under the Bill and Regulations

	Key Adopted Partially adopted Unclear Not adopted (non-critical) Not adopted (important or critical)
Recommendations	**Status under Bill**
The road to reform	
Recommendation 1: Create a single environment approval process with the Environment Minister as decision maker (as per Option 2 of Hawke Review II).	Adopted
Recommendation 2: (in the alternative): Build Option 2 into the current environmental regulatory reform agenda as Stage 3, allowing time to transition and, in particular, for the resource implications of this model to be identified, assessed and worked through.	Not applicable
Recommendation 3: The NT Government should not enter into bilateral agreements with the federal government to assume responsibility for the approval of actions which trigger the federal environmental assessment regime.	Unclear (the Bill only makes provision for co-operative arrangements around assessment: see Part 6 Division 2. However, these could be done under the *EPBC Act 1999* potentially)

Purpose and principles of assessment systems	
Not applicable.	Not applicable
Defined assessment triggers	
Recommendation 4: The failure to refer a relevant activity and to obtain approval is an offence.	Adopted (cl 47)
Recommendation 5: The person or organisation carrying out the activity may be either prosecuted or fined, depending on culpability.	Unclear (as no penalties prescribed)
Recommendation 6: Significant penalties should be in place to deter proponents from failing to refer.	Unclear (as no penalties prescribed)
Recommendation 7: An activity should be defined broadly to include a development, project, plan, program, policy, operation, undertaking, change in land use, or an amendment of any of these things.	Partially adopted (cl 5 does not include program or policies)
Recommendation 8: Likely should include a real or not remote chance or possibility.	Not adopted (as likely is not defined)
Recommendation 9: Significant should be defined as important, notable or of consequence, having regard to its context and intensity.	Adopted (cl 10)
Recommendation 10: Impact should include direct impacts, as well as off-site and indirect impacts.	Adopted (cl 9)
Recommendation 11: Environment includes: a. ecosystems and their constituent parts, including people and communities b. natural and physical resources c. the qualities and characteristics of locations, places and areas d. heritage values of places e. the social, economic and cultural aspects of a thing mentioned in paragraph a, b, c or d.	Partially adopted (cl 6 does not adopt this structure nor specifically mention heritage)
Recommendation 12: The Department of Environment and Natural Resources should immediately begin community consultation on TEOs before a Discussion Paper is prepared.	Partially adopted (DENR produced discussion paper in September 2018; CLC/NLC will know more)

Recommendation 13: Community consultation on TEOs should address whether TEOs or some other test is the best means of protecting the environment as well as achieving good practice principles.	Partially adopted (DENR produced discussion paper in September 2018; CLC/NLC will know more)
Recommendation 14: Specific types of developments should also be subject to environmental assessment, being identified upfront and placed on a schedule based on factors such as their capacity to cause environmental impacts, capital investment value, location or some combination of these factors.	Not adopted (NLC have been told that triggers will be declared by the Minister 'as needed' – this is a concern)
Assessment processes commensurate with risk	
Recommendation 15: Proponents should also have a duty to refer where a project is likely to have a material impact on the environment.	Adopted (cl 63)
Recommendation 16: Strategic environmental assessment should be based on the following principles: 1. strong legislative standards and science-based tools 2. strong decision making criteria, including a 'maintain or improve' test 3. comprehensive and accurate mapping and data 4. undertake SEA at the earliest possible stage for maximum benefit 5. require alternative scenarios to be considered 6. ground-truthing of landscape-scale assessment is vital 7. mandating public participation at all stages for positive outcomes 8. SEA should complement, not replace, site-level assessment.	Not adopted (there are no specified principles or standards for SEA. The Regulations allow the NT EPA to recommend a strategic assessment to the Minister under cl 28(2)(c))
Recommendation 17: A strategic environmental assessment (SEA) of a spatial plan, policy, program or industry should require: ▪ collation of available information ▪ identification and filling of critical knowledge gaps ▪ identification of matters of environmental significance (under the (CTH) *EPBC Act 1999*) ▪ establishment of outcome objectives for the plan, policy, program or industry ▪ examination of development and land-use options (so as to minimise impacts on protected matters and retain ecological integrity) ▪ an analysis of the consequences of the different options ▪ analysis of how cumulative impacts will be dealt with, including under future scenarios	Not adopted (neither the Bill or the Regulations provide any detail as to what is required under SEA)

▪ a description of mitigation measures, and quantification of expected benefits ▪ a description of adaptive management approaches in the plan, policy program or industry.	
Recommendation 18: NT EPA should provide appropriate financial and technical support to Aboriginal communities and other affected groups and persons to prepare and implement SEA proposals which meet legislative and public policy goals.	Unclear (Bill and Regulations are silent on this)
Quality of information used in decision making processes	
Recommendation 19: The preparation of a scorecard about the adequacy of environmental assessment documents should be mandatory, rather than discretionary.	Not adopted (this concept seems to have disappeared)
Recommendation 20: The scorecard should be used at both draft and final stages of the EIS document.	Not adopted (this concept seems to have disappeared)
Recommendation 21: Adequacy should include whether the environmental assessment is in plain English and meets accepted readability standards.	Not adopted
Recommendation 22: There should be a requirement to consider whether a proponent is a fit and proper person, based on the NSW model, but also including whether the person or entity had committed offences under the (NT) *Northern Territory Aboriginal Sacred Sites Act.*	Not adopted (Fit and proper person is only defined under the Regulations. There is no specific reference to the NTASS Act).
Recommendation 23: There should be public disclosure of government decision making throughout the assessment and approval process including: ▪ referrals ▪ draft and final Terms of Reference ▪ draft and final EIS ▪ draft and final environmental assessment report ▪ final environmental approval only.	Partially adopted (some of these exist under the Bill and others under the Regulations including: ▪ cll 91, 92 and 93 (approval) under the Bill ▪ cll 72 and 73 (terms of reference) under the Regulations ▪ cll 90 and 91 (draft EIS) under the Regulations
Recommendation 24: There should NOT be public or proponent disclosure of the draft environmental approval.	Not adopted (there is consultation with the proponent regarding a draft environmental approval but no community consultation: see cl 86(2))

Recommendation 25: The environmental offence and penalty structure in the Northern Territory should be reviewed and simplified with a view to setting a clear and consistent framework capable of delivering the public policy ends sought under a system of self-assessment.	Unclear (Bill and Regulations are silent on this)
Recommendation 26: The quantum for environmental offences and penalties in the Northern Territory should be doubled to ensure deterrence.	Unclear (Bill and Regulations are silent on this)
Recommendation 27: There should be a flexible range of orders available to enforcement authorities and courts including requiring an offender: ▪ to publicise the offence ▪ undertake an environmental restoration project ▪ carry out an environmental audit ▪ attend a training course.	Adopted (see cl 249 although no specific audit provision)
Recommendation 28: There should be penalty-for-profit provisions to deter non-referrals and other behaviours which could lead to harm to the environment.	Adopted (see cl 249 (d))
Recommendation 29: The Department of Environment and Natural Resources should establish a Steering Committee to explore the best model for the Northern Territory.	Not adopted
Recommendation 30: Climate change should be integrated into the assessment and approval process. This should include: ▪ scoping the proposal - ensuring potential greenhouse gas emissions are consistently and adequately scoped in project development ▪ developing standard environmental assessment requirements for greenhouse gas emissions ▪ preparing the environmental impact statement – assessing estimated greenhouse gas emissions and developing mitigation actions (avoid, minimise, manage, offset) ▪ evaluating the proposal impacts and merits against any Territory targets or aspirations ▪ determining the proposal – ensuring greenhouse gas emissions are part of the overall consideration by decision makers.	Not adopted (there are no references to climate change or related concepts, although this could be done administratively under triggers and TEOs)

Recommendation 31: ESD should be integrated into the assessment and approval process, including: ▪ as an object to be achieved ▪ requiring decision makers to make decisions that further the objects of, and legislative targets under, legislation ▪ requiring decision makers to take ESD into account when assessing and approving projects ▪ requiring decision makers to ensure ecological integrity (maintain or improve environmental values) before approving developments under a strategic assessment approach.	Partially adopted (ESD is to be promoted under the objects (cl 3); its principles are set out under Part 2 Division 1 of the Bill – although they sometimes depart from accepted definitions; it needs to be considered generally (cl 14(2)) and under EIA (cl 59) and the Minister must be satisfied that an action is consistent with ESD (cl 87(2)). No need for reasons under clause 14(3) is of concern
Recommendation 32: Guidelines on social impact assessment and improved valuation and pricing should be considered to assist in the quality of information and decision making.	Unclear (the Bill does refer to the publication of guidance documents under cl 265)
Recommendation 33: The objects of the new environmental assessment legislation should include recognition of the role of Indigenous people in the conservation and ecologically sustainable use of natural and cultural resources.	Not adopted (there is no recognition of Indigenous people in the objects although there is a principle of sustainable use under cl 18)
Recommendation 34: There should be a requirement that traditional knowledge be integrated into all phases of environmental assessment, in collaboration with, and with the permission and oversight of, Aboriginal communities and Traditional Owners.	Not adopted (this is not apparent at all under the Bill or the Regulations)
Recommendation 35: The legislation should confirm Aboriginal ownership of traditional knowledge and include provisions to protect Indigenous knowledge from and against its unauthorised use, disclosure or release.	Not adopted (this is not apparent at all under the Bill or the Regulations)
Recommendation 36: The legislation should include an obligation on the proponent to consider how they engage with Aboriginal communities and Traditional Owners and that they: ▪ work with the community during planning and conducting its research ▪ seek the prior and informed consent of the community prior to acquisition of information ▪ collect traditional Aboriginal knowledge in collaboration with the community ▪ respect traditional Aboriginal knowledge and Aboriginal intellectual property rights, and ▪ bring traditional Aboriginal knowledge and scientific knowledge together.	Not adopted (this is not apparent at all under the Bill or the Regulations)

Encouraging public participation	
Recommendation 37: There should be public consultation throughout the assessment and approval process including: ▪ referrals ▪ draft and final terms of reference ▪ draft and final EIS ▪ draft and final environmental assessment report ▪ final environmental approval only.	Partially adopted (some of these exist under the Bill and others under the Regulations including: ▪ cll 91, 92 and 93 (approval) under the Bill ▪ cll 72 and 73 (terms of reference) under the Regulations ▪ cll 90 and 91 (draft EIS) under the Regulations
Recommendation 38: There should NOT be public or proponent consultation on the draft environmental approval.	Not adopted (cl 83(b) allows inspection of the draft environmental approval and consultation with the proponent under cl 86(2))
Recommendation 39: Proponents should be required – under legislation - to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter.	Unclear (the Bill does refer to the publication of guidance documents under cl 265)
Recommendation 40: A key element of the consultation report and engagement plan needs to involve engaging with Aboriginal communities.	Not adopted (this is not apparent at all under the Bill or the Regulations)
Recommendation 41: Engagement with Aboriginal communities needs to be done in accordance with established guidelines that include guidance on matters such as: ▪ a presumption of on-country consultation ▪ the need for plain English and local language versions of documents, or parts of documents ▪ the importance of culturally appropriate practices ▪ who is to be consulted, including Traditional Owners and diverse Aboriginal communities ▪ resources provided to facilitate engagement.	Unclear (the Bill does refer to the publication of guidance documents under cl 265)
Recommendation 42: Failure to complete consultation reports and engagement plans adequately (for example, in accordance with the guidelines) should be part of the adequacy review conducted by NT EPA.	Not adopted (this is not apparent at all under the Bill or the Regulations)

Recommendation 43: Land Councils should have a concurrence role in the adequacy review conducted by NT EPA, specifically determining the adequacy of the consultation report and engagement plan where Aboriginal consultation is required.	Not adopted (this is not apparent at all under the Bill or the Regulations)
Recommendation 44: Timeframes should be staggered – according to legislative requirements - for different projects, depending on their size and significance.	Partially adopted (there are different timelines for different parts of the process and there is discretion to extend in some circumstances)
Recommendation 45: NT EPA should have the discretion to extend timeframes based on the consideration of factors such as size, significance, cultural practices, weather and remoteness.	Adopted (the Minister can seek more time in writing under cl 88(2))
Recommendation 46 (in the alternative): NT EPA should make an upfront determination of the appropriate timeframe for particular projects, based on the referral documents, consultation report and an assessment of such factors.	Not applicable
Recommendation 47: NT EPA should have the power to 'stop the clock' where the consultation report is assessed as inadequate and/or important information is presented or uncovered during the assessment process.	Partially adopted (under the Regulations, NT EPA may stop the clock where they need more information: see cl 18(4))
Improving environmental outcomes and accountability	
Recommendation 48: The Minister should issue all environmental approvals, based on publicly available advice from NT EPA.	Adopted (see Part 7)
Recommendation 49: The requirement to give reasons should include a statement in writing setting out: ▪ the findings on material questions of fact ▪ referring to the evidence or other material on which those findings were based ▪ giving the reasons for the decision.	Unclear (the Bill only requires a statement of reasons, either published or to the applicant: see cll 40(b), 42(4), 77(b), 91(2)(a), 92(1)(b). 93(3), 104(3), 154(1)(b), 156(3)(b) and 262(3)) NB: Other clauses under the Regulations also require reasons
Recommendation 50: It should be an offence to provide information in the assessment and approval process which is false and misleading, either knowingly, recklessly or negligently.	Adopted (see cl 240)

Recommendation 51: Significant penalties should attach to this offence, which can be graded depending on intention.	Unclear (Bill and Regulations are silent on this)
Making the best use of our community's eyes and ears	
Recommendation 52: Any person may refer a proposal to the NT EPA for assessment if it thinks it may have a significant impact on the environment.	Not adopted (a proponent must refer under cl 63 and the NT EPA can call-in under cl 68)
Recommendation 53: Referrals should be made as soon as practicable.	Adopted (referral be a proponent starts the EIA process: see cl 63)
Recommendation 54: Referrals are to be made public.	Partially adopted (if accepted, referrals must be published but this only arises under the Regulations, not the Bill: see cl 26 of the Regulations)
Recommendation 55: Referrals need to comply with simple guidelines.	Adopted (the Regulations do not set out such guidelines but do set down grounds for refusal under cl 22)
Recommendation 56: Consultation reports and engagement plans should be lodged when referring a matter.	Not adopted (this is not apparent at all under the Bill or the Regulations)
Recommendation 57: A formal public response to the referral should be required (by NT EPA), except in exceptional circumstances.	Partially adopted (the NT EPA must give notice in relation to standard assessment or SEA but this only arises under the Regulations, not the Bill: see cll 23 and 25 of the Regulations)
Recommendation 58: In exceptional circumstances, NT EPA would be able to dismiss a referral through declaring it a referral without foundation.	Partially adopted (the NT EPA can refuse to accept a referral but this only arises under the Regulations, not the Bill: see cl 22 of the Regulations)
Recommendation 59: A referral should operate to 'stop the clock', meaning other approvals would need to wait for a referral decision.	Adopted (The Minister needs to give approval before the proposal can proceed)

Recommendation 60: NT EPA and/or the Minister should have a 'call in' power.	Adopted (the NT EPA can call-in under cl 68)
Recommendation 61 (in the alternative): A combination of organisations and entities be empowered to refer matters – namely: ▪ Land Councils, Prescribed Bodies Corporate, government agencies, particular environment and industry groups (through formal authorisation) ▪ affected stakeholders (as of right).	Not applicable
Introducing review processes	
Recommendation 62: The following assessment decisions should be reviewable: ▪ whether a proposed activity should have been referred ▪ whether a proposed amendment should have been referred ▪ if so, the assessment method required.	Unclear (see the media release of 30 October 2018)
Recommendation 63: The following approval decisions should be reviewable: ▪ whether to approve a proposed activity, including any conditions proposed ▪ whether to approve a proposed amendment, including any conditions imposed.	Unclear (see the media release of 30 October 2018)
Recommendation 64: The ground under which judicial review can be sought should be established under legislation, in line with the federal approach.	Unclear (see the media release of 30 October 2018)
Recommendation 65: The following people and groups should have standing for merits review: ▪ proponents ▪ affected stakeholders (such as neighbours or peopled downstream from a development) ▪ particular environment and industry groups ▪ Land Councils and local governments ▪ Prescribed Bodies Corporate. a person who made a substantive submission throughout the referral process.	Unclear (see the media release of 30 October 2018)
Recommendation 66: Any person should be able to bring proceedings to remedy or restrain a breach of an environmental law, or to stop harm to the environment.	Unclear (see the media release of 30 October 2018)

Recommendation 67 (in the alternative): As with merits review, the following people and groups should have standing for judicial review and enforcement: ▪ proponents ▪ affected stakeholders (such as neighbours or peopled downstream from a development) ▪ particular environment and industry groups ▪ Land Councils and local governments ▪ Prescribed Bodies Corporate ▪ a person who made a substantive submission throughout the referral process.	Unclear (see the media release of 30 October 2018)
Recommendation 68: Standing should also be extended to others in limited circumstances, such as where it is in the public interest or the interests of justice to do so.	Unclear (see the media release of 30 October 2018)
Recommendation 69: The Northern Territory Civil and Administrative Tribunal (NTCAT) should deal with merits review.	Adopted (although see the media release of 30 October 2018)
Recommendation 70: The Supreme Court should deal with judicial review matters.	Adopted
Recommendation 71: The existing protections against vexatious litigants and proceedings be maintained.	Unclear (Bill and Regulations are silent on this
Recommendation 72: Where public interest litigation is undertaken, access to justice should be facilitated through procedural reforms including changes in the following areas - the normal rules on costs, undertakings for damages and security for costs.	Adopted (see cll 217(2), 222 and 223)
## Roles and responsibilities	
Recommendation 73: NT EPA - an independent regulator established under statute – should be retained.	Adopted (the most recent 2018 reforms retained the NT EPAs independence under s 9)
Recommendation 74: NT EPA should exercise advisory, assessment and regulatory functions.	Partially adopted (the Act does not contemplate the NT EPA undertaking compliance and enforcement)
Recommendation 75: Enhanced funding should be made available to NT EPA to enable it to exercise its advisory, assessment and regulatory functions.	Unclear (there is no evidence to suggest that funding to the NT EPA has been increased)

Recommendation 76: NT EPA should explore user pays models to undertake its functions.	Adopted (the Bill makes provision for bonds, levies and environmental funds under Part 9)
Recommendation 77: NT EPA should explore engaging an experienced environmental counsel to provide advice on regulatory and enforcement functions.	Unclear (the Bill and Regulations are silent on this)
Recommendation 78: NT EPA should ensure that membership of its Board values Indigenous traditional knowledge and participation by ensuring direct Aboriginal representation on this basis.	Not adopted (section 10 of the *NT EPA Act* only requires that a member must have certain core skills (such as business, science and law) and may have other skills around indigenous issues: see sections 10(2)(b) and 3(a)(ii))
Recommendation 79: NT EPA should establish an Indigenous Advisory Committee under legislation to advise on the operation of the new reforms.	Not adopted (this is not apparent at all)
Recommendation 80: Changes to the NT EPA governance structure should be undertaken in close consultation with Aboriginal communities.	Unclear (there is no evidence of this, although CLC/NLC will or may know more)
Introducing environmental offsets	
Recommendation 81: The Department of Environment and Natural Resources should immediately begin community consultation on environmental offsets before a Discussion Paper is prepared.	Unclear (there is no evidence of this, although CLC/NLC will or may know more)
Recommendation 82: These consultations should form the basis of a Discussion Paper on offsets, including principles and mechanisms to give clear guidance on the scope and application of the scheme and to address ecological, social and equity considerations.	Unclear (there is no evidence of this, although CLC/NLC will or may know more)
Recommendation 83: Consultation should be ongoing, including the establishment of an independent Steering Committee with oversight and advisory functions.	Unclear (there is no evidence of this, although CLC/NLC will or may know more)

Appendix 2: Analysis of Bill and Regulations

(NT) Environment Protection Bill: comments and analysis			
Issue	**Reference**	**Preliminary view**	**Comments and notes**
Objects	Cl 3	Partially supported	Mirrors Victoria: ESD is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends. Needs to recognise First Nations peoples such as under the Territory Parks and Wildlife Conservation Act ss 25AB and 25AC(a) and the need to recognise connection to Country. Also see such as under EPBC Act 1999 section 3(1)(d), 3(1)(f), 3(1)(g), 3(2)(g)(iii) and 3(2)(g)(iv).
Key definitions (cl 4, Division 2)			
Action	Cl 5	Supported	Mirrors *EPBC Act 1999* approach where things are actions (see ss 523) or are NOT actions (see 524 and 524A).
Environment	Cl 6	Not supported	As drafted, this is the same as the existing definition under the (NT) *Environmental Assessment Act* and the *NT EPA Act.* It falls somewhere between NSW, Victoria and Commonwealth. NSW: ***environment*** includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings. VIC: ***environment*** means the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics. CTH: ***environment*** includes: (a) ecosystems and their constituent parts, including people and communities; and (b) natural and physical resources; and

			(c) the qualities and characteristics of locations, places and areas; and (d) heritage values of places; and (e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d). Support a version like the Commonwealth – for example: ***environment*** includes: (a) ecosystems and their constituent parts, including people and communities; and (b) natural and physical resources; and (c) the qualities and characteristics of locations, places and areas; and (d) heritage values of places; and (e) the social, economic and cultural aspects (including those pertaining to First Nations' peoples) of a thing mentioned in paragraph (a), (b), (c) or (d).
Environmental harm	Cl 7	Supported	Defined broadly. The concept is defined similarly under SA law but is not defined under CTH, NSW or Victorian law. NSW does have a concept of material harm as follows: (1) For the purposes of this Part: (a) harm to the environment is material if: (i) it involves actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial, or (ii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding $10,000 (or such other amount as is prescribed by the regulations), and (b) loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent, mitigate or make good harm to the environment.
Significant environmental harm	Cl 8	Unclear	The reference to remediation costs is somewhat baffling as it is not clear how this relates to significant environmental harm.
Impact	Cl 9	Partially supported	Adopts simplified version of *EPBC Act 1999* definition.

Significant impact	Cl 10	Partially supported	Not defined under EPBC act but under Guidelines as: A 'significant impact' is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts. See http://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf
Principles (Part 2): this part follows Victorian (EP Act 1970) although there it refers to the intention of Parliament			
ESD	Cl 14	Partially supported	The lack of need to set out how the principle is considered under cl 14(3) is not consistent with transparency and accountability and is strongly opposed.
Decision-making	Cl 15	Supported	
Precautionary	Cl 16	Supported	Mirrors Victoria.
Intergenerational equity	Cl 17	Supported	Mirrors Victoria.
Sustainable use	Cl 18	Supported	
Biodiversity conservation	Cl 19	Not supported	Too watered down – see provisions below: Bill - Biological diversity and ecological integrity should be conserved and maintained. Victoria and NSW - The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making (see s 1E of (VIC) *Environment Protection Act 1970* and (NSW) *Protection of the Environment Administration Act 1991* s 6(2)(c).
Valuation and pricing	Cl 20	Supported	Mirrors Victoria.
Economic competitiveness	Cl 21	Not supported	The origin of this principle is from the National Strategy in 1992. It has not been taken up elsewhere and it is certainly not an accepted ESD principle today.

Management hierarchies			
Environmental decision-making	Cl 23	Supported	Uses mitigation hierarchy: avoid/mitigate/offsets.
Waste management hierarchy	Cl 24	Supported	Uses accepted hierarchy of avoid/reduce/reuse/recycle/recover etc (see (VIC) Environment Protection Act s 11).
Environment protection policies			
Purpose	Cl 25		
Contents	Cl 26	Partially supported	Talks about outcomes and indicators but is still discretionary as to content.
General environmental duty			
	Cl 33	Supported	Similar approaches are evident elsewhere in Australia: see ▪ (QLD) Environmental Protection Act 1994 s 5 and Part 4; ▪ (SA) Environmental Protection Act 1993 Part 4.
Environmental protection declarations			
Declaration of TEOs	Cl 36	Not supported	The role is unclear and seems to seek to replicate the federal approach, which is inappropriate.
Declaration of triggers	Cl 37	Not supported	The role is unclear and seems to seek to replicate the federal approach, which is inappropriate.
Consultation on TEOs and triggers	Cl 39	Supported	If this approach is pursued, there needs to be fulsome consultation.
Need to publish proposed and final TEOs and triggers	Cl 38 & 40	Supported	Needs to give reasons per 40(b).

Review of TEOs and triggers	Cl 43	Partially supported	Review is supported, timeframe is too long.
Consultation in relation to review	Cl 45	Unclear	Consultation needs to be broad; as currently drafted, priority seems to lie with EPA. Similarly, it seems to suggest that only sections of the community will be invited to make a submission.
Offences	Cll 47 & 48	Unclear	It is not clear why and how the different offences work.
Declaration of protected environmental areas and prohibited actions			
Declaration of environmental areas	Cl 49	Partially supported	Power strongly welcomed but very vague (e.g. "value is such that it should be protected").
Declaration of prohibited actions	Cl 50	Partially supported	Power is positive; however it is unclear as to what an example of a prohibited action is.
EIA process			
Purpose of EIA process	Cl 59	Unclear	A positive statement but it is unclear how this section aids decision-making.
Referral	Cl 63	Partially supported	Support tripartite approach (i.e. referral, approval, sig impact) but not use of TEOs per cl 63(2).
Referral for SEA	Cl 64	Supported	Support tripartite approach (i.e. referral, approval, sig impact).
Call-in power	Cl 68	Supported	
EPA to consider variations	Cl 71	Not supported	The process should be set out in the Act, not relegated to the regulations. Modifications and variations are frequently used to bypass environmental protections. See EP&A Act s 5.4 re reduced impact.
	Cl 74	Not supported	The provision puts the onus on the government and the agency to respond in a very short time.

Decision of Minister	Cl 76	Partially supported	DO NOT support: ▪ The provision under cl 76(2) puts the onus on the government and the agency to respond in a very short time ▪ Vagueness of cl 76(4). Fit and proper should not be left to the regulations. See (NSW) POEO Act 1997 per section 83 and (VIC) EP Act 1970 where it refers to offence in last 10 years.
Statement of unacceptable impact	Cl 82	Partially supported	Should be mandatory to provide a statement if EPA considers unacceptable per cl 82(1).
Decision of Minister re draft environmental approval	Cl 86(2)	Not supported	There is no provision for community consultation.
Matters to be considered	Cl 87(1)	Partially supported	87(1)(d) introduces too much discretion.
	Cl 87(2)	Supported	Excellent – Minister must reach a level of satisfaction.
Time	Cl 88(4)	Not supported	Deemed approval/refusal is not best practice decision-making.
	Cl 88(5)	Unclear	Not sure whether enough time.
Environmental approval granted if Minister rejects statement	Cl 92	Not supported	There is no provision for community consultation.
Conditions of approval			
Conditions of approval	Cl 94	Supported	
	Cl 95	Supported	
	Cl 96	Partially supported	Should be mandatory.
	Cl 97	Supported	

	Cl 98	Unclear	Not sure re standard conditions. Be better to do this administratively.
Amendment of approval	Cl 104(2)	Not supported	There is no provision for community consultation.
Revocation of approval	Cl 105	Supported	
Suspension of approval	Cl 106	Supported	
Show cause	Cl 107	Unclear	Not clear why due process is always given – what about summary revocation or suspension?
Revocation at request of holder	Cl 110(2)	Unclear	Not sure this is best formulation of test?
	Cl 110(4)	Not supported	There is no provision for community consultation.
	Cl 116(a)-(c)	Supported	Appropriate heads of consideration.
	Cl 116(d)	Not supported	Too broad.
Consultation on transfer	Cl 117	Not supported	There is no provision for community consultation.
Offsets framework	Cl 119	Unclear	Not clear that this is appropriate for Regulations – suggest more detail should be in the Bill?
Offsets register	Cl 120	Supported	All good and approaching best practice.
Purpose of bond	Cl 122	Supported	All good and approaching best practice.
Levy	Cl 127	Supported	All good and approaching best practice.
Funds	Cl 130	Supported	All good and approaching best practice.
	Cl 131	Unclear	Good idea but not sure operationally. Where are funds for compliance and enforcement?

Review of environmental aspects	Cl 136	Unclear	Seems like a good idea but precise role?
	Cl 138	Supported	
Registration of auditors	Cl 142	Supported	However, more of the detail should be in the Bill.
Conflict of interest	Cl 143	Supported	All good and approaching best practice.
Enforcement			
Powers	Cl 153	Supported	All good and approaching best practice.
Search warrant	Cl 156	Supported	All good and approaching best practice.
Directions	Cl 159	Supported	All good and approaching best practice.
Purpose of EP notice	Cl 163	Supported	All good and approaching best practice.
Emergency notice	Cl 167	Supported	All good and approaching best practice.
Stop work notice	Cl 176	Supported	All good and approaching best practice.
Closure notices			
Contents	Cl 183	Supported	All good and approaching best practice.
Decision of Minister	Cl 195	Supported	Appropriate level of satisfaction.
Need to provide financial assurance	Cl 196	Supported	Good idea, and good boundaries.
Enforceable undertakings	Cl 198	Partially supported	Need to be used as part of compliance policy; have bad reputation generally EP&A Act section 9.5; BC 13.27.
Duty to notify	Cl 208	Supported	Reflects NSW position – needs to be immediate.

Incriminating information	Cl 213	Supported	Reflects High Court position.
Injunctions	Cll 214-217	Supported as per the Bill	Appropriately broad and it looks like the government's flagged changes in its 30 October media release do not apply to injunctions.
Interim injunctions	Cl 217(2)	Supported	Not allowed to require undertaking for damages.
Considerations not relevant for injunctions	Cl 218	Supported	Need to check but seems OK.
Other civil orders	Cl 220	Supported	Appropriate orders re cost recovery etc.
Security and undertakings	Cl 222	Supported	Public interest considerations.
Costs	Cl 223	Supported	Public interest considerations.
Orders as to damages	Cl 224	Not supported	Seems punitive when failure may be evidential etc.
Time for bringing	Cl 225(1)	Unclear	Longer than usual but this may be appropriate. 2 years under BC 13.4; EP&A Act 9.57(5) and (5A) – offence committed and evidence.
	Cl 225(2)	Supported	Good to give Court the flexibility.
Civil penalties			
CEO may recover	Cl 227	Not supported	Seems too broad, no due process.
Maximum amount	Cl 230	Not supported	Seems too broad, no due process.
Court to have regard to certain matters	Cl 233(a)-(d)	Supported	Appropriate framing of issues.
	Cl 233(e)		Appropriate framing of issues, but for 233(e).
Criminal liability	Cl 245	Unclear	Think it's OK.

	Cl 246	Supported	
Alternative verdicts	Cl 247	Supported	
Sentencing principles	Cl 248	Supported	Reflects NSW approach per Justice Preston.
Additional Court orders	Cl 249	Supported	Reflects NSW.
CEO may step in and take measures	Cl 250	Supported	
Who can commence proceedings?	Cl 251	Supported	Looks fine; need to check EPA v CEO powers, as appropriate.
Time for commencing	Cl 252	Supported	3 years seems more than enough. (NSW) BC Act s 13.4 allows 2 years.
Standing for judicial review	Cl 254	Supported as per Bill	BUT government has backtracked indicating restricting to directly affected. <u>Open standing</u> ▪ there is no reason to restrict standing where there is a breach or anticipated breach of an environmental law, or the prospect of harm ▪ NSW has had open standing – where any person can bring proceedings – in most of its environmental legislation for nearly forty years ▪ ALRC has previously concluded that "there is an important role for private plaintiffs in public interest litigation"[32] ▪ neither the AG nor government agencies can be trusted with enforcement due to a "range of political, financial and bureaucratic factors"[33] ▪ the public has a strong interest in ensuring that decision-makers are held to account, and proponents are complying with their development approval. ▪ the NT may lack the necessary resources to ensure compliance, while open standing provides public interest litigants with the opportunity to enforce

[32] Australian Law Reform Commission (1996) Beyond the door-keeper: Standing to sue for public remedies at 4.15: see http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html

[33] Australian Law Reform Commission (1996) Beyond the door-keeper: Standing to sue for public remedies at 2.36: see http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html

			▪ no evidence to suggest that open standing provisions result in frivolous or vexatious appeals – the so-called 'floodgates' argument[34] ▪ shifts analysis – and costs - to the substantive matter, rather than on whether the community or environmental group is entitled to be in the Court.[35]
Review by NTCAT	Cl 255	Supported	Broad enough – could perhaps be simpler.
Public register	Cl 258	Supported	Register is supported; only concern is CEO power over form but have this in NSW per Part 9.5 of the POEO Act 1997.
Direction notice	Cl 259	Supported	
Methodologies	Cl 260	Unclear	Not sure what methodologies they are talking about.
Exemption	Cl 262	Not supported	No apparent basis for the need. NSW: POEO Act 1997 section 284 An exemption may be granted in: (a) an emergency (including, for example, fires, floods and fuel shortages), or (b) circumstances where: (i) the EPA is satisfied that it is not practicable to comply with the relevant provision or provisions, by implementing operational changes to plant or practices, and (ii) the EPA is satisfied that non-compliance with the provision or provisions will not have any significant adverse effect on public health, property or the environment, and (iii) the Board of the EPA approves the granting of the exemption.
CEO report on compliance etc	Cl 264	Partially supported	Report is supported; only concern is CEO power over form.
Guidance documents	Cl 265	Supported	Work well under CTH and NSW law. See http://www.environment.gov.au/epbc/policy-statements

[34] The Hon Justice Peter McClellan P (2005) Chief Judge at Common Law Supreme Court of NSW "Access to Justice in Environmental Law: an Australian Perspective", paper presented at Commonwealth Law Conference 2005 London 11-15 September 2005.

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

Offences			
Reckless conduct and environmental harm	Cl 35	Partially supported	Defence is quite broad per 35(3). In NSW, $5,000,000 (wilfully) or $2,000,000 (negligently) for corps; $1,000,000 or 7 years gaol, or both (wilfully) or $500,000 or 4 years gaol or both (negligently).
Trigger action without authority	Cl 47	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence.
Carry out action having sig impact without authority	Cl 48	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence.
Carry out actions in protected areas	Cl 57	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence.
Carry out prohibited action	Cl 58	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence.
Fail to comply with call-in	Cl 69	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence.
Fail to comply with approval	Cl 103	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence.
Failure to do audit	Cl 140	Partially supported	Why is this not a specified offence? No penalties are provided, which can significantly reduce the efficacy of the offence.
Not providing relevant information	Cl 146	Partially supported	Why is this not a specified offence? No penalties are provided, which can significantly reduce the efficacy of the offence.
False or misleading	Cl 147	Partially supported	Why is this not a specified offence? No penalties are provided, which can significantly reduce the efficacy of the offence.
Hindering	Cl 161	Partially supported	Why is this not a specified offence? No penalties are provided, which can significantly reduce the efficacy of the offence.

Compliance with EP notice	Cl 174	Partially supported	Why is this not a specified offence? No penalties are provided, which can significantly reduce the efficacy of the offence.
Compliance with stop work order	Cl 181	Partially supported	No penalties are provided, which can significantly reduce the efficacy of the offence. Penalty is $1,650,000 (corps) or $330,000 (individuals) under (NSW) *BC Act 2016*.
False and misleading	Cl 240(1)	Partially supported	Why is this not a specified offence? No penalties are provided, which can significantly reduce the efficacy of the offence.
	Cl 240(4)	Unclear	Unclear what defence getting at.
Failure to comply with Court order	Cl 241		Necessary – Court contempt powers? NSW $110,000 for corps and $22,000 for people (1/10 that for each day continuing).
Continuing offences	Cl 242(2)	Partially supported	Why so low?

(NT) Environment Protection Regulations: preliminary comments and analysis			
Issue	Reference	Preliminary view	Comments and notes
Concepts (Part 2)			
Fit and proper person	Cl 4	Not supported	Should be in the Bill, otherwise it can be removed easily, undercutting accountabilities and checks and balances.
Methods of EIA	Cl 5	Not supported	Should be in the Bill, otherwise it can be removed easily, undercutting accountabilities and checks and balances.
Environment protection policies (Part 3)			
Publication, submissions etc	Cll 8-15	Not supported	Should be in the Bill, otherwise they can be removed easily, undercutting accountabilities and checks and balances.
When takes effect	Cl 16	Supported	

Referral of proposed actions (Part 4)			
Consideration of referral	Cll 18-23(1), 23(3)	Not supported	Should be in the Bill, otherwise they can be removed easily, undercutting accountabilities and checks and balances.
Details re notice	Cll 23(2)	Supported	
Accepted referral (under Div 3)	Cll 24-41	Not supported	Almost all these clauses and sub-clauses should be in the Bill, otherwise they can be removed easily, undercutting accountabilities and checks and balances.

Environmental Impact Assessment			
	Cl 43-52		
Fees and charges not refunded	Cl 53	Supported	
	Cll 54-83, 85-119	Not supported	Almost all these clauses and sub-clauses should be in the Bill, otherwise they can be removed easily. A good example is the notice provisions. The Act should state that notice is required – an important element around natural justice, access to information etc – while the Regulations should set out the details around the notice; where, when, how etc.
Matters to be included	Cl 84	Supported	
Standard conditions			
		Partially supported	Standard conditions at least entrench the need to provide conditions with approvals (not always the case in the NT)

Variation of actions			
	Cll 136-141, 144-175	Not supported	Almost all these clauses and sub-clauses should be in the Bill, otherwise they can be removed easily.
	Cll 142-143	Not supported	These provisions, in particular, could undermine the entire Bill.
Registration of environmental practitioners			
Fit and proper person	Cl 177, 178, 180-193	Not supported	Almost all these clauses and sub-clauses should be in Bill, otherwise they can be removed easily.
Application for registration	Cl 179	Partially supported	This provision is fine in theory. It does not contain anything that needs to be in the Bill but nor does it contain sufficient information to be in the Regulations.
Registration of environmental auditors			
	Cl 194, 195, 197-210	Not supported	Almost all these clauses and sub-clauses should be in Bill, otherwise they can be removed easily.
	Cl 196	Partially supported	This provision is fine in theory. It does not contain anything that needs to be in the Bill but nor does it contain sufficient information to be in the Regulations.
Notice of environmental incidents			
	Cl 211	Supported	
Review by CAT			
	Cl 212, Schedule 3	Unclear	Unclear, in light of the media release of 30 October 2018.

Appendix 3: Example TEOs incorporating an Indigenous perspective

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

2. The Territory will maintain and enhance the quality of environments and their contributions to human well-being by:
   - maintaining critical features of the structure and function of Territory landscapes at all spatial scales
   - protecting biophysical and cultural connections within and among important elements of the landscape.

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

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

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

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

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

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

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

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

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

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

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