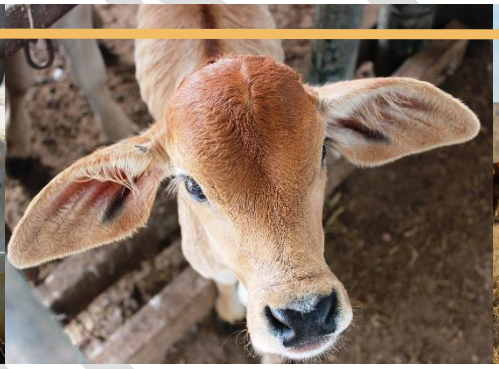
NORTHERN TERRITORY CATTLEMEN'S ASSOCIATION


Draft Environmental Protection Act 2019: Submission and Commentary

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1. EXECUTIVE SUMMARY

The Northern Territory Cattlemen's Association has a number of concerns in regard to the draft *Environmental Assessment Act* currently being proposed by the Northern Territory Government.

As a consequence, the NTCA is not prepared to offer its unconditional support for the changes and asks that the legislation not be progressed until these matters are addressed in totality.

The NTCA believes that a full Regulatory Impact Statement (RIS) needs to be completed and released for comment before the legislation can be progressed further. The development of an RIS is considered best practice and should have already been completed and in our opinion circulated with the original draft.

In addition to that the NTCA would like to see any benchmarking document which exists which demonstrates beyond reasonable doubt these changes bring us into line with other jurisdictions or if they exceed the current standard across Australia.

Another concern within the draft is there appears to be no final environmental objectives and triggers and a lack of timeframes for the assessments leaves too much ambiguity and uncertainty moving forward.

Based on previous experience The NTCA do not accept a "trust us". It is, in our opinion the equivalent of asking for a blank cheque.

The NTCA believe before the legislation is commenced that government and if necessary, the NT EPA hold industry sector specific workshops as to how these reforms will be operationalised.

The NTCA have included within our submission a mock case study of what the impacts are of some of the proposed changes within our industry. However, these scenarios may change as the detail of the legislation specifically around triggers becomes known.

The NTCA is concerned the overarching principle of this legislation has been created in such a way that it is designed to stop development rather than assist it. The diversification of the pastoral estate is a case in point and it brings with it enormous economic value including wealth and job creation.

But with the administrative burdens partly outlined in this draft legislation the hope or commercial value of a development maybe extinguished before it is started. This upside-down principle goes against all of the public statements which have been uttered by the Northern Territory Government and its leaders.

Singular to this is the extraordinary power given to the Minister for Environment who will have the right to not only veto projects but industry as well. This power does not have a review trigger for the Executive Cabinet of Government nor does it have a review power of the Legislative Assembly.

The NTCA question where else in Australia an Environment Minister has such a power. It goes to the core of why The NTCA require the RIS and a benchmarking of other jurisdictions to be completed as a matter of urgency.

The NTCA thank you for the opportunity to comment on this proposed legislation and ask you carefully consider our concerns with the good intentions for which they are provided.

2. MOCK CASE STUDY – PASTORALISTS LAND CLEARING FOR NON-PASTORAL USE

Joe Bloggs is a pastoralist in the Top End of the NT. His station is a 3,000 km^2 property, the average for the NT, where he runs 5,000 Brahman.

To diversify his business, Joe wants to start broadacre cropping, with his consultant advising him that dryland annual crops such as corn, cotton, sorghum and mung beans are all feasible options on his soils. For this enterprise to be viable in terms of logistics and economies of scale, Joe would need to plant about 5,000 hectares annually. Due to the vegetation on his property, he would need to clear 5,000 hectares of land to make this operation work. This area represents about 1.6% of his pastoral lease, of which there has been no previous clearing.

2.1.1. Land Clearing Permit

Large scale land clearing operations like this one require large amounts of technical information on soil, flora and fauna, clearing plans and land types. Generally, for these larger clearing applications a qualified consultant's advice and report would be needed due to the expertise and technical difficulty in obtaining this information. Consultants fees start at about $15,000-20,000 with plans taking around a month to compile. Areas under 1,000 hectares do not generally require the help of land clearing consultants.

Heritage areas and Aboriginal areas of significance within the clearing area must also be described. Initially this is a simple process requesting an inspection of the registers from the Aboriginal Areas Protection Authority (AAPA). This incurs a small fee of $27.00 and is usually processed within 2 weeks. If there are sites present in the development zone this process can get far more complex, with months of time and tens of thousands of dollars of expense to the developer.

Lodging the application has a fee of $584. Development proposals are then advertised to the public for a period of two weeks. Joe is required to address concerns raised by the public which then extends the process. Typically, current land clearing applications take 6-12 months to be approved.

With the proposed changes to environmental legislation, the complexity of Joe's application would be increased exponentially. Starting with an instant referral to the NT Environment Protection Agency, an environmental impact assessment may need to be undertaken. As seen in the mining industry, consultant's fees for these can be in the range of $200,000-300,000 and take many more months of work.

Impact assessments require far more detail than what is currently required. Database searches and free reference checks would no longer provide enough detail and the expense of undertaking additional surveys and consultation would be necessary. Biological surveys may need to be taken for a number of species, with each survey costing upwards of $25,000 and taking several weeks or months. AAPA sacred sites Authority Certificates may be necessary, with minimum costs of $20-30,000 and a 3 to 4 month time frame. Additional consultancy fees of around $5-10,000 associated with sites of Conservation significance.

With the proposed changes to the environmental legislation; open standing and automatic referral to the NT EPA, developers could be faced with a huge increase in consultancy fees and additional time taken to process applications. Joe's application could end up costing his business an extra six to 12 months in time and $300,000 in consultancy and analysis fees.

2.1.2. Non-Pastoral Use (NPU) Permit

As Joe plans to start growing grain and fibre crops in addition to his pastoral business he would need to apply for a non-pastoral use permit. Currently the NPU application process is comparatively simple when looked at with the land clearing guidelines. The information required for the application is not as technical in nature and more suited to what a pastoralist can provide. It is more common for developers to forego the use of a consultant in this process, thereby keeping costs down.

Traditional Owners must be consulted during the NPU process. This process generally takes at least three to four months of discussions to arrive at an agreement. This must occur before an NPU permit will be processed.

In this instance, Joe doesn't need a water license as he plans to grow his crops during the wet season. However, if he were to need water he would have to apply for a license. This takes three to four months as a minimum and has associated costs of around $1,000 for advertising a public notice. It is estimated to then set up irrigated agriculture would cost around $10-15,000 per hectare.

Much of the same information required by the NPU would need to be provided for the more laborious land clearing permit, which in this case Joe has already paid a consultant for. A development site description, sacred sites and sites of conservation significance as well as a description of the intended NPU and details of the NPU development.

Under the new legislation, where Joe would have a problem would be in increased processing times of NPU applications. Open standing would mean that the environmental assessment period could be drawn out by many more months by parties that are indirectly affected, such as environmental groups. Already, discussions with TO's can take months or years as at Pine Hill station. Creating longer and more demanding review processes will dissuade pastoralists from trying to diversify and develop their businesses.

The tables on the next page demonstrate the comparison between the current system and the proposed system. They have been compiled sourcing information from Territory based consultants who currently complete this work.

	Current	Proposed legislation
Land clearing	**Cost:** Minimum cost $610, with consultation fees starting at $15,000	**Cost:** Minimum cost $200,000
	Time: Process of application would normally take 6-12 months	**Time:** Process of application would now take 15-18 months as a minimum
NPU	**Cost:** $610 in application fees	**Cost:** No change
	Time: 6-9 month process minimum	**Time:** 12-18 month dependent on objections from parties indirectly impacted

3. COMMENTARY: DRAFT ENVIRONMENT PROTECTION ACT 2019

3.1.1. Section 17

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

Comment: It appears to the NTCA that the right to develop has actually been written out of the principle. The new principle being to stop development, not assist it. The NTCA fail to see how this helps create wealth and jobs in the pastoral sector through diversification and that it is a conflict to the often publicly articulated position of the NT Government.

3.1.2. Sections 36-48 (Part 5, Division 1)

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

More importantly, however, missing from both the proposed legislation and the proposed regulation is any language with regard to objective thresholds by which the significance of an impact is to be measured once the decision to require an Environmental Impact Statement (EIS)

has been made. If this is the purpose of objectives, then the legislation or regulations should say so.

Comment: On this basis the NTCA believes the legislation should not proceed until the triggers for referral have been finalised.

3.1.3. Sections 49-50

This Division gives the Minister for the Environment the power to declare permanent development moratoria. The NTCA disagree with vesting this extraordinary grant of power in a single person. A more appropriate approach would be to grant only the power to declare a short locational or activity-based moratorium of a specified timeframe. It should then be left to the Legislative Assembly to decide whether such a draconian action as a longer or permanent moratorium should be put in place.

Comment: While it is unlikely there is going to be a development which would cause the Minister for environment to act in such a manner the overall principle and the betterment of the Territory is a fundamental driver behind the NTCA. Giving an individual such a power is unheard of in the Territory and The NTCA would challenge the NT Government to demonstrate where such a power exists in any other jurisdiction.

3.1.4. Section 80 et seq. (Part 7)

The purpose of environmental impact analysis is to provide decision makers with sufficient data on environmental impacts to make informed decisions in balancing a variety of factors and policies, including both environmental and economic development.

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

Part 7 gives the Minister for Environment veto power over virtually every development project in the Northern Territory. Not only does the legislation grant the Minister the ability to refuse an environmental approval after environmental impact assessment has been conducted (section 86), it grants to the Minister the power to establish criteria that triggers environmental impact assessment in the first place (section 37), and the power to establish environmental objectives by which an environmental impact assessment is presumably measured (section 36). This even extends to transfers of environmental approvals already granted (section 113). There appears to be no appeal from the Minister's decisions. The scope of power this legislation grants to the Minister is breathtaking, and The NTCA are aware of no other Australian jurisdiction in which so much authority is granted to a Minister with portfolio of the environment.

Based on data from the NT EPA, the average (mean) time since 2010 for projects for which an EIS was required took over 900 days to get from Notice of Intent to assessment report.

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

In approving an underlying action, however, the decision-maker with responsibility for approving the action lies should also be required to declare or certify any EIS for the action as having been prepared in compliance with the legislation and regulations. This will provide clarity as to the finality of the environmental impact assessment process for purposes of any relevant statute of limitation.

Comment: The Northern territory economy, the beef industry or any other industry for that matter cannot afford to be subject to this level of delay. Time is of an essence with economic development and windows close and commercial viability can be lost in timeframes set out above. The Territory cannot allow such administrative processes to be put in place. It will destroy any opportunity to create wealth and jobs through the diversification of the pastoral estate alone and The NTCA direct you to our Mock Case Study outlining the impacts on timeframes.

3.2. SECTION 82

The NTCA feels it is not a role of the NT EPA to be engaging in value judgments as to whether impacts are acceptable or unacceptable. A value judgement of this nature involves the weighting of the competing social, commercial, or economic benefits against an environmental impact. Those judgments are the province of the ultimate decision-maker.

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

Comment: The expansion and transfer of powers to the NT EPA to include value judgment is an abrogation of the decision-making process.

3.3. SECTION 225

The NTCA contends a three-year statute of limitation is too long and will only increase the uncertainty that inhibits investment and job creation. The time for commencement, at least for challenges to a decision on an assessment (either in the first instance or modification), should be no more than 90 days.

The conclusion of an environmental impact assessment process must provide a reasonable level of certainty to the party who has prepared the EIS or other applicable assessment

documentation. A three-year statute of limitation, at which time a project may be well underway, provides no such security.

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

3.3.1. Part 12, Division 1 generally

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

4. DRAFT ENVIRONMENT PROTECTION REGULATIONS 2019

4.1.1. Regulations 31, 35, 41

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

4.1.2. Regulation 99

Any interested party should be allowed to provide a submission on a supplement to an EIS. NT EPA, however, should be allowed to disregard new information of a nature that could

reasonably have been brought to the attention of NT EPA during the submission period on the draft EIS. This will serve the purpose of a more complete opportunity for public participation without creating the potential to 'sandbag' the proponent of an action at the last minute.

4.1.3. Regulation 114(2)

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

4.2. REGULATION 115

Please refer to our comments above on section 80 et seq. Environmental impact assessment should not become a product. It should remain a process, with decision-making authority vested in the Minister responsible for the sector in which the project lies (or other statutory decision-maker), based on the recommendations of the NT EPA and Minister for the Environment.

4.3. REGULATION 176

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